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# PRINCIPLES OF BANKING

FOURTH EDITION

BY

**S. EVELYN THOMAS**

Ph.D., B.Com. (Lond.), F.G.I.S., F.C.C.S., Cert. A.I.B.

*"Beckett," "Charles Reeve," and "Gwyther" Prizeman,  
Institute of Bankers.*

*Author of "The Principles and Arithmetic of Foreign Exchange,"  
"Banker and Customer," "Elements of Economics," "Banking  
and Exchange," "The Rise and Growth of Joint Stock Banking,"  
"Teach Yourself Economics," etc.*

AND

**MAURICE MEGRAH**

M.Com. (Lond.), Barrister-at-Law

AUTHOR OF

*"Bills of Exchange Act, 1882," "The Banker's Customer," etc.*

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## PREFACE

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I have prepared this book with the express object of meeting the requirements of those who are embarking for the first time on the study of the Practice and Law of Banking, either for the purpose of their daily work, or with the intention of taking the examinations of the Institutes of Bankers in this subject.

In view of its great importance from both a practical and an examination standpoint, the law relating to Bills of Exchange has received detailed treatment, and the Bills of Exchange Act, 1882, is reproduced in the Appendix with cross references to the text which I hope the reader will find useful.

During the process of compilation, I have necessarily made constant reference to the recognized authorities and standard works on the subject, but my acknowledgments are specially due to the works of Sir John Paget, Sir MacKenzie Chambers and Dr. Heber Hart, and, of course, to those abecedaries of the banking student, *Questions on Banking Practice* and *Legal Decisions Affecting Bankers*.

In the preparation of the completely revised fourth edition, I have had the advantage of unstinted help and advice from Mr. Maurice Megrah, whose unrivalled knowledge of the law of bills of exchange and of banking has led to a rewriting of parts of the original text, with benefit, I am sure, to those who rely on this book for practical and examination purposes.

October, 1945.

S. E. T.



# PRINCIPLES OF BANKING

## PART I

### THE BANKER

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#### CHAPTER 1

#### THE RISE AND GROWTH OF ENGLISH BANKING

BANKING in this country may be said to have originated many centuries ago in the business of money-lending or usury conducted by wealthy Jewish merchants in London. These early financiers were subject to much interference, and ultimately were expelled from the country. Later, in the fourteenth century, a similar type of business was carried on by merchants from the Lombard States of Italy, from whom is derived the name of that famous London thoroughfare, Lombard Street, E.C.

These early money-lenders were not really bankers, as we understand the term. They made profits by lending their own private capital, and performed only one side of the modern banker's characteristic function of borrowing from some customers in order to lend to others.

It was not until about 1645 that any organization similar to that of a bank began to take shape. About this time, London merchants began to leave their surplus wealth for safekeeping with the *goldsmiths*, who issued in return signed receipts, called "*goldsmiths' notes*"—the forerunners of the modern bank note—which were written undertakings to return the money deposited to the bearer on demand.

The goldsmiths learnt by experience that they could safely and profitably lend out a part of the funds left with them in this way, for only a comparatively small proportion of gold was needed in their tills to meet current withdrawals and probable demands.

In time, therefore, the more enterprising of them began to make advances by the issue of notes payable to bearer on demand and to pay interest as an inducement for the deposit of money with them (at a lower rate, of course, than they charged for loans), while some of them abandoned their original functions and applied their whole energies to this new banking business. At the same time, competitors sprang up who were bankers first and last, and who performed no function other than ~~that~~ dealing in money and issuing bank notes.

## The Rise of the Bank of England

The foundation of the Bank of England in 1694 marked the first step in the direction of joint-stock banking in this country. In return for a loan of £1,200,000 to the Government of the day, the subscribers were granted a charter incorporating them as the Bank of England, with the privilege of issuing notes payable to bearer on demand up to the extent of the sum lent.

The new bank was an immediate success, and, in order to prevent the formation of rival institutions, an Act was passed in 1708 forbidding the issue of notes payable to bearer on demand by any joint-stock bank other than the Bank of England.

As the issue of notes was the essential function of all banks in those days, the Act had the practical effects of preventing the formation of joint-stock banks and of confining the function of note issue in England and Wales to a multitude of small private banks, which were subject to no legal regulation and were in many cases totally unfitted to bear their responsibilities.

## The Beginnings of the Cheque System

Another important result of the Act of 1708 was to cause a change in the functions of bankers in London. Here, and in the surrounding district, the Bank of England note was supreme, and its predominance eventually caused the London private bankers to abandon the issue of notes, and to develop *deposit banking, i.e.*, the acceptance of deposits, withdrawable on demand in writing signed by the depositor.

About 1780, the London bankers began to issue printed forms of cheques, by which depositors could withdraw such amounts as they required, or instruct their bankers to pay third parties. Like the notes they superseded, these early cheques were invariably made payable to *bearer* on demand.

## Financial Difficulties Created by the Napoleonic Wars

Early in the nineteenth century, banking in this country was in the hands of three different types of institution. First, there was the Bank of England, supreme by virtue of its charter and its monopoly of the issue of notes in and around London. Then there were the London private banks, struggling to establish the system of deposit banking and the issue of cheques. Finally, there was the heterogeneous group of uncontrolled small private note-issuing banks throughout the country, founded and conducted by people in almost every walk of life—cheesemongers, miners, grocers and innkeepers.

It is not surprising that a sequence of disturbing factors should entirely disorganize such a weakly-knit fabric. England's participation in the Napoleonic Wars towards the close of the

eighteenth century had involved her in serious financial difficulties. The Bank of England's gold reserve had been seriously depleted, and, when rumours of a French landing brought about a panic and a demand for gold, an Order in Council had to be issued in 1797 permitting the Bank to suspend payments in cash.

### Banking and Currency Troubles

In succeeding years, there was almost continuous trouble over the banking and currency systems. Violent speculation and disaster followed the declaration of peace with Napoleon in 1814, and hundreds of private note-issuing banks failed. The collapse of the note issues meant a reduction in the volume of the paper currency, so gold fell in price, and the exchanges became unfavourable to London. In 1816, when Britain adopted gold as the sole standard of value, the Bank attempted to resume cash payments, but was not able to do so until 1821, when its notes were made convertible into gold.

In some quarters, the currency and banking difficulties were attributed to the monopolistic privileges of the Bank of England, and, in subsequent years, a number of Acts were passed with the object of mitigating the effects of its monopoly.

An Act of 1826 permitted the establishment of joint-stock banks of issue with *unlimited* liability provided they did not conduct business within a radius of sixty-five miles of London. This important enactment not only lessened the Bank's monopoly of joint-stock banking, but also strengthened the provincial banking fabric by permitting strong joint-stock banks to replace many weak private bankers.

The Bank Act of 1833 marked the beginning of the present banking system. This Act permitted the establishment in London itself of joint-stock banks for the transaction of *all* banking business other than the issue of notes to bearer on demand. In this respect the Act still further modified the power of the Bank of England, although, in another direction, the Bank's prestige was increased, for, by the same Act, its notes were made legal tender in England and Wales for all payments over £5 (except by the Bank itself or its branches).

The passing of the Act of 1833 was followed immediately by the establishment in London of several joint-stock banks—the fore-runners of the great institutions of to-day. While they developed deposit banking and the cheque system with great benefit to the community, there was much criticism of the unregulated note issues of the Bank of England and of the private banks, and, on this matter, great controversy arose between two opposing schools of thought, the *Currency School* and the *Banking School*.

The so-called *Currency Theorists* held that bank notes should be issued only to provide convenient and economical substitutes for metallic money ; they maintained that the issues should be limited to the amount of gold held against the notes, and that the circulation of notes should be regulated according to the flow of gold into and out of the national reserves.

The *Banking School* took the view that the issues of notes could safely be left to the discretion of the bankers, so long as the circulating currency was limited by them to the *legitimate* demands of business and trade ; they held that any notes in excess of trade requirements would be presented for encashment ; that, so long as an *adequate* reserve was maintained, strict convertibility would be ensured and inflation prevented without the necessity of holding gold to cover every note issued.

### The Bank Charter Act, 1844

In the end, the Government brought about far-reaching changes by passing the Bank Charter Act, 1844. In some respects the Act was a compromise : although it ensured the maintenance of adequate gold reserves behind the Bank of England note, it provided also for a limited issue against securities.

The Act laid down that the Bank of England was to be divided into two distinct departments, called the *Issue Department* and the *Banking Department* respectively. The Issue Department was authorized to issue notes against securities (the *Fiduciary Issue*) to the amount of £14,000,000, and was required to cover all issues in excess of this amount by gold and silver in reserve, the silver not to exceed one-fourth of the gold held. Any person was to be entitled to demand notes from the Issue Department in return for gold bullion at the rate of £3 17s. 9d. per ounce standard, *i.e.*, 1½d. per ounce below the legally fixed mint price of gold, while, in order to ensure full publicity regarding its position, the Bank was required to publish, in the *London Gazette*, a Weekly Return of the assets and liabilities of both Departments.

Those responsible for the Act were determined that the English issue of bank notes should be ultimately concentrated in the hands of the Bank of England. Hence it was provided that no further banks of issue were to be established, and that any existing bank losing the right of issue should not be entitled to resume such issue. It was also decreed that if, after the passing of the Act, any country bank ceased to issue notes, the Bank of England could obtain an Order in Council empowering it to increase its fiduciary issue by two-thirds of the lapsed issue. The object of centralizing the English note issues in the hands of the Bank of England was attained

in 1923, when the Bank took over the remnant of the private bank note issue in England and Wales.

The Act of 1844 aimed at ensuring the absolute convertibility of note issues in this country, together with full publicity regarding the amount of the issues and of the reserves held against them. It aimed also at so regulating the paper currency that inflation would be prevented, speculation and crises obviated, and the foreign exchanges stabilized.

### The Growth of the Joint-Stock Banks

Succeeding years saw a great increase in the power and influence of the Bank of England. Its note issues were the sole legal tender paper currency until the outbreak of war in 1914, whilst it acted as banker to the British Government and, in course of time, to all the other banks in the country, an arrangement that proved of vital significance in its relation to the structure of the English banking system and the London Money Market.

During this time the joint-stock banks were by no means at a standstill. Faced from the outset with jealousy and even open hostility on the part of the Bank of England and the private bankers; hampered by the difficulties which necessarily attended inexperience, and forced to develop the comparatively new system of deposit banking, the early joint-stock banks nevertheless made great progress, and, in the half-century following 1844, two important changes in the law did much to strengthen their position and facilitate their development.

The first of these was the *extension of limited liability to Banks* by an Act of 1858. The shareholders in the first joint-stock banks were liable *in full* for all debts of the companies, and it was not until 1858 that the principle of *limited liability*, which had already been applied to other corporations, was extended to banking concerns. This gave a further impetus to the expansion of joint-stock banking, for the limitation of liability made bank shares more attractive to investors who previously could not afford to risk holding them.

In 1879, the principle of *reserve liability* was legalized, *i.e.*, limited companies were empowered either to increase the nominal amount of their shares so that a certain amount over and above that paid up on each share could be called up only in the event of liquidation of the company; or to resolve that a portion of the existing uncalled amount of each share should be callable only in the event of the company's winding-up. The adoption of this principle by the joint-stock banks gave depositors and creditors an added security by creating a reserve which could be called upon only in the last resort (see also page 17).

## The English System of Note Issue

required it, and, at the same time, made it impossible to do so.

As a result, critics of the Bank Charter Act considered that the Bank's fiduciary circulation was too small, and that the note circulation, which could be increased in times of emergency only by the uncertain interference of the Government, should be elastic and capable of automatic expansion, when such action was required, to provide adequate supplies of currency for legitimate trade requirements.

In the difficult war and post-war years, 1914-1928, the Government was to some extent inclined by the circulation of Treasury notes, but well-known authorities considered that our inflexible currency system partly accounted for the protracted post-war depression in this country, particularly as compared with the more prosperous conditions in the United States, where an elastic system made possible the expansion of currency and credit to keep pace with business demands. The dual system of note issue existing in consequence of the issue of currency notes by the Treasury also had obvious disadvantages, and amalgamation of the issue was clearly essential.

### The Currency and Bank Notes Act, 1928

This Act provided for the amalgamation of the Treasury and Bank note issues, and for greater elasticity in the Bank's issue. It provided that, as from an appointed day, fixed subsequently as 22nd November, 1928, all outstanding currency notes were to be deemed to be Bank of England notes, and the Bank was made responsible for their repayment. The existing restriction on the Bank's power to issue notes below £5 was removed, and the Bank was given authority to issue notes for £1 and 10s., which were made legal tender for the payment of any amount in Britain and Northern Ireland, even by the Bank itself or any of its branches. The £5 Bank note was made legal tender in England and Wales for payment of any amount, except by the Bank itself or its branches, and not, as under the Act of 1833, legal tender for payments above £5 only.

The Bank was also authorized to issue notes against the Issue Department's total holding of gold coin and gold bullion (and not

gold or silver, as under the Bank Charter Act, 1844), and, in addition, to increase its fiduciary issue to £260,000,000. The securities so held could include silver coin to an amount not exceeding £5,500,000.

The Act of 1928 thus retained the principle of a *fixed fiduciary issue* established by the Bank Charter Act; but it met the demand for a more elastic note issue by permitting the Bank of England to increase the fiduciary issue above the fixed limit with the sanction of the Treasury and, in certain circumstances, of Parliament. As a result, the Bank's fiduciary issue at the time of writing (April, 1945) totals £1,250 millions.

## FEATURES OF MODERN ENGLISH BANKING

The development of the joint-stock banks has naturally been bound up with that of the country as a whole, and their organization has been continually improved to keep pace with modern conditions. Striking features of that development include the concentration of the banks by amalgamation and absorption into a small number of very large institutions; the establishment by the larger institutions of branches throughout the country; the extension of the activities of English banks to other countries, the development of the Central Reserve System, and the spread of mechanization and other economies.

### Amalgamation in English Banking

The process of amalgamation between the banks has resulted in the development of vast organizations, notably the "Big Five"—the Midland, Lloyds, Barclays, the Westminster, and the National Provincial—with head offices in London and branches throughout the country.

The growth in the size of English banks has occasioned a certain amount of uneasiness. Some people maintain that the concentration of enormous resources under the control of a small number of bank directors constitutes a danger to the community. Some fear the harmful effects of monopoly, whilst others fear that such large institutions may become unsound.

So far as the customer is concerned, the process of amalgamation is attended by the disadvantages involved in the disappearance of the personal element. The centralization of control at Head Office introduces an element of "red-tape" which limits the initiative of the local manager, while there is a tendency for both the manager and the head office to have less of that essentially specialized knowledge of local occupations, industries, customs and prejudices which was so characteristic of the old private banker. Furthermore, there is some danger that the continual growth of the banking institutions may result in the inadequate supervision

of loans and the granting of more accommodation than is strictly justified. Some of the banks have to some extent counteracted these tendencies by the formation of local directorates.

In spite of criticism, the balance of opinion is that large scale organization has, on the whole, been advantageous both to the banking system and to the community. Nevertheless, in 1924 and again in 1925, the Chancellor of the Exchequer announced that no further amalgamations of the large joint-stock banks would be favoured.

### Expansion Both at Home and Abroad

The remarkable expansion of the branch banking system is traceable to the intensity of competition between the leading institutions, the desire to provide every convenience for customers, the endeavour to increase business and profits by tapping new resources, and the wish to effect greater economy by saving agents' commissions and expenses.

For a long period of years, foreign banks have had branches in London and other world centres, but before 1911 the interests of English banks in places outside this country were entirely served through the agency of foreign institutions. In the past, this policy applied even to the neighbouring countries of Scotland and Ireland, and it was, consequently, a marked departure from established practice when certain leading English banks opened branches in important continental towns, and also acquired interests in or established working agreements with banks in Scotland, Ireland, and other countries.

### The Development of the Central Reserve System

A highly important feature of the British banking system is the arrangement whereby the liquid cash reserves of the great banks are concentrated in the hands of the Bank of England, which thus acts as the banker's bank, and, largely by virtue of this fact, occupies a position of great influence and power in the Money Market.

The branches of the joint-stock banks in London and throughout the country maintain on hand only sufficient cash to meet their ordinary requirements for till money; they transfer the bulk of their surplus funds to the head offices, which maintain a current account with each local branch. On the same principle, each head office retains only sufficient cash on hand to meet its estimated requirements, leaving any surplus funds on current account with the Bank of England, whence they may be withdrawn in legal tender on demand. As the account of the Clearing House is also kept at the Bank, the maintenance by each clearing banker of a current account with the Bank facilitates the large transfers necessary for clearing purposes.



The Bank of England is thus liable to be drawn upon at any time to meet heavy demands for legal tender in any part of the country. Customers depend on the branch banks for supplies of currency; the branch banks look to their head offices, and these, in turn, depend on the Bank of England. Despite this, the Bank conducts its business in the same way as any other banking institution, and is under no legal obligation to make special provision to meet demands from the banks as distinct from its ordinary customers. Nevertheless, its moral obligation to safeguard the nation's ultimate cash reserve is not unrecognized, and, whenever necessary, special measures must be taken to prevent any undue depletion of its resources.

### **The Spread of Mechanization and Other Economies**

Mechanization was first introduced into the banks in 1930 and developed very rapidly, particularly in the head offices and large branches. As a result, the banks were enabled considerably to economize their male staff, to relieve the staff of much of the drudgery of hand-listing, casting and hand-posting, and to provide customers on demand with up-to-date typewritten ledger statements. There are possibilities of still greater development, *e.g.*, in connection with centralized ledger posting.

During the World War, the need for economizing man-power in the banks led to the closing of certain branches and agencies, the curtailment of certain services for customers, and the introduction of various devices intended to economize in effort and time. Some of these, *e.g.*, the posting of cheques in one run on the day after payment, may be permanently adopted, while the closer co-operation between the banks may result in the permanent closing of some branch banks and agencies.

## **CHAPTER 2**

### **FUNCTIONS OF THE BANKER**

#### **Definition of a Bank**

ENGLISH law contains no definition of the term "bank", though s. 2 of the Bills of Exchange Act, 1882, contains the statement that "'Banker' includes a body of persons, whether incorporated or not, who carry on the business of banking". This statement, however, is not of much help, for it gives no indication of what is comprised by "the business of banking".

Possibly the most widely recognized definition of a banker is that given by Hart,<sup>1</sup> which is as follows:—

“A banker is one who, in the ordinary course of his business, receives money, which he repays by honouring the cheques of the persons from whom or for whose account he receives it.”

This definition implies that the essential function of a banker is the acceptance of deposits of funds withdrawable on demand by cheque. Hence the frequently used definition of a banker as “a dealer in money and credit” is not satisfactory, for there are many other forms of financial business which involve dealings in money and credit, as, for example, the business of a money-lender, or of a bill broker.

### The Banker's Main Functions

In addition to receiving money on *current* account withdrawable on demand and for the most part bearing no interest, the banker also accepts money on *deposit* on which interest is allowed and from which withdrawals are usually subject to a specified period of notice, e.g., seven or fourteen days. Some bankers also accept deposits *at call*, i.e., repayable on demand, usually at a lower rate of interest than deposits at notice.

Though different banks in the same district normally pay the same rates of interest, deposit terms and interest rates vary in different parts of the country. In the London district, interest rates fluctuate with the Bank rate. If, as is frequently the case, the banker waives notice, he deducts interest on the amount withdrawn for the period of notice.

The banker uses the funds deposited with him in various ways, as in granting overdrafts on current account or loans of fixed amount on loan account, or in discounting bills of exchange and promissory notes. (Thus, the main function of a banker is really a dual one—he borrows with one hand in order to lend with the other. He functions both as lender and borrower, and makes his profit out of the difference between the rate at which he borrows and the rate at which he lends. Whilst both aspects are important, the banker's solvency and success depend primarily on the judgment he displays in lending to others what he himself has borrowed.)

### Services of the Banker

The modern banker performs numerous services which are of great use to his customers and to the community generally. These fall into two main groups, viz.: (1) *Agency* services, and (2) *General Utility* services.

The services of the banker as an agent include those rendered in collecting and paying cheques, bills, promissory notes, coupons,

<sup>1</sup> *Law of Banking*, page 1.

dividends, subscriptions, and insurance premiums; in conducting stock and share transactions (in respect of which he divides the commission with the stockbroker); in acting in various other agency capacities, such as those of trustee, attorney or executor, and as agent, correspondent or representative for his customers and for other banks and financial houses at home or abroad.

The banker's general utility services include (a) the issue of various forms of credit instruments such as letters of credit, travellers' cheques and circular notes, all of which enable the customer to benefit from the banker's reputation for solvency and prompt payment; (b) the transaction of foreign exchange business, which brings considerable profit to the banker, and provides the business community with invaluable facilities for its dealings with foreign nationals; (c) the acceptance of bills of exchange, whereby the banker lends his name in return for a commission and thus enables his customers to "trade" on his superior credit; (d) the safeguard against fire and theft of valuables and important documents in his specially constructed strong rooms, a function which makes the banker a *bailee* of the goods entrusted to his keeping; (e) the distribution throughout the country of supplies of legal tender currency, with the related duties of withdrawing from circulation light coins and soiled notes; and (f) the giving of opinions as to the respectability and financial standing of customers, a function of considerable value not only to the banks themselves but also to business men generally, since it furnishes them with reliable and speedy information as to the general standing of people with whom they are dealing, and enables them to avoid losses due to giving credit to persons of little or no financial worth.

### The Utility of Banking

Banking institutions are an essential part of the credit and currency mechanism. They organize and control the issue and circulation of credit instruments; they regulate the granting of bank credit in the form of advances and loans; they facilitate the movement of loanable capital, and make possible its distribution and use to the best advantage; they provide currency when and where it is required, and transfer surplus currency from some areas to places that are short of supplies.

The functions of the banks are of inestimable value to trade and industry. In acting as intermediaries between large numbers of depositors or lenders on the one hand and numerous borrowers on the other, banks mobilize capital and make its use effective. They act as great reservoirs of loanable money. Into them flow a host of small streams of liquid funds; from them are distributed throughout the country supplies of productive capital at the times when and in the places where they can be most efficiently used. Countless

small sums of money are rendered productive which would otherwise remain idle, and the wealth of large and small capitalists is rendered mobile and transferred to areas where it can be efficiently and profitably employed, to the ultimate benefit of the community as a whole.

The facility with which loans can be obtained from banks acts as a stimulus to production and an incentive to industrial enterprise. Manufacturers and traders know that they can rely upon the banks for sound advice and financial accommodation at difficult periods, while the banks, by a judicious regulation of credit, can perform an economic function of first importance in checking speculation and preventing financial crises.

The existence of a sound and competitive banking system is in itself an encouragement to saving, thrift and economy. The small depositor is brought to appreciate the facilities for safe investment which the banks provide, and even the poorer classes become imbued with feelings of security and prosperity and are encouraged to develop the "saving habit".

When it is remembered to what extent time, money and labour are saved by the cheque system, and by the general utility services of our banking institutions, it will be seen that a country with a sound banking system is possessed of one of the firmest foundations of prosperity.

### Classification of Banks according to Functions

The functions which we have described are common to nearly all banks operating in Great Britain, but it is possible to distinguish a certain degree of specialization based on the transaction of a special type of business.

**THE BANK OF ENGLAND.**—The Bank of England, by virtue of the circumstances of its foundation and of its subsequent rise to predominance, is in a class of its own. In addition to conducting most of the functions of a modern bank (except the acceptance of bills), it acts as banker to the State and to all the other banks in the country, assumes responsibility for the safeguarding of the nation's ultimate cash reserve, co-operates with the Treasury in the control of the currency and the regulation of the prevailing rate of discount and of the foreign exchanges, and has the sole right to issue bank notes in England and Wales.

**THE JOINT-STOCK CLEARING BANKS.**—In the second class are included the nine large joint-stock banks which are members of the London Clearing House (see Chapter 17), and which have numerous branches and a widespread provincial business.

**JOINT-STOCK BANKS WITH SPECIALIZED FUNCTIONS.**—There are several banks with a specialized business. Thus the well-known

banks of Lancashire cater for the special needs of our great cotton and woollen industries (e.g., the District Bank and Williams Deacons Bank, with their head offices in Manchester); while the Scotch and Irish banks specialize in business with/and in Scotland and Ireland respectively. Then there are such concerns as the British Overseas Bank and the British Bank for Foreign Trade, specializing in the financing of overseas trade; the Yorkshire Penny Bank, catering for the poorer classes in the Yorkshire manufacturing centres; the Birmingham Municipal Bank, accepting small deposits from the working-class population and applying the funds for municipal purposes; the Trustee Savings Banks, whose deposits, though mainly of small individual amount, total hundreds of millions; and the Co-operative Wholesale Society, Ltd. (Bankers), which has a very large number of shareholders and is potentially a powerful competitor for deposits.

**PRIVATE BANKS.**—The fourth class is now mainly of historical importance, as there remain only two important representatives—Messrs. Glyn, Mills & Co. (now affiliated to the Royal Bank of Scotland) and Messrs. Charles Hoare & Co.—of the once numerous class of old-established private banking firms.

**THE DOMINION AND COLONIAL BANKS IN LONDON.**—In this group there are, first, the banks that specialize in business with the self-governing Dominions—Canada, Australia, New Zealand and South Africa—acting as financial agents for the Dominion Governments and undertakings, and conducting most of the exchange business between London and the Dominions. Some of these banks, such as the Bank of Australasia and the Bank of New Zealand, have their head offices in London, although their branches and the bulk of their business are located in the Dominions.

In this group are also included banks, such as the Bank of British West Africa, whose business is primarily with our colonies and dependencies, and Barclays Bank (Dominion, Colonial and Overseas), which has a widely distributed business in certain Dominions, Colonies and foreign countries.

Then there are the Eastern Exchange Banks, such as the Chartered Bank of India, Australia and China, and the Hong-Kong and Shanghai Banking Corporation, which are engaged primarily in the conduct of banking business (particularly bullion and exchange operations) with our Indian Empire, China and other Eastern countries.

**MERCHANT BANKERS.**—In a sixth class are the various City concerns known as “merchant bankers” or “merchant banks”. Most of these function mainly as “accepting houses”, *i.e.*, in return for a commission they lend their names by accepting bills drawn on them by persons at home or abroad (see p. 264).

**FOREIGN BANKS.**—This class embraces a large and cosmopolitan group of foreign banks, the existence of which is evidence of the financial importance of London and the consequent need for representation therein of most of the important banks in the world. The foreign institutions transact business mainly with or for their own nationals, but they also play an important part in the cosmopolitan sphere of London banking.

### Classification of Banks according to their Mode of Incorporation

Banks in this country may also be classified according to their mode of incorporation.

First in order of historical importance are the *banks established by royal charter*, among which are the Bank of England and the Bank of Scotland, together with certain imperial institutions such as the Chartered Bank of India, Australia and China. The powers and constitution of such banks are defined by their charters, while the liability of each shareholder is limited to the amount of his holding of capital.

The second class comprises the *joint-stock banks with limited liability* registered under the Companies Acts. Most British banks, including the "Big Five", belong to this group and their shareholders are drawn from all sections of the community.

The third class, comprising private *joint-stock banks with unlimited liability*, is now practically obsolete, and such representatives as remain are associated with or controlled by larger joint-stock banks, e.g., Glyn, Mills & Co. (Royal Bank of Scotland) and Coutts & Co. (National Provincial Bank).

Finally, there is a heterogeneous class of banks, including the merchant bankers in the City (many of whom trade as private partnerships), and the banks incorporated under Dominion or foreign laws.

### Advantages of Joint-Stock Constitution

Most of the large banks are registered as corporate bodies under the Joint-Stock Companies Acts, in just the same way as the majority of other large trading concerns. This method of incorporation is of advantage both to the bank itself and to the public. The former benefits directly by the absence of the formalities and delays which accompany the incorporation or the alteration of the constitution and powers of an institution formed by Royal Charter, and also obtains the advantages of limited and reserve liability and of free transferability of its shares. Indirectly, a public joint-stock bank benefits also from the wide publicity regarding its affairs that reforms the public's strongest safeguard.

## CHAPTER 3

### THE BANKER'S FUNDS

IN accepting deposits on current account and in granting loans to his customers the banker incurs a liability to pay legal tender on demand, whereas a large proportion of his advances, although contractually repayable on demand, or a few days after demand, are in practice repayable only after a delay varying with the circumstances of the advance. In lending his funds, therefore, the banker must ensure that he does not run any risk of being unable to meet any demand likely to be made upon him.

The world-wide reputation of British banks is attributable in no small degree to their punctuality of payment and to their ability and judgment in deciding how much they can lend and how best they can lend. Modern joint-stock banking in this country has been built up and is still based upon the principle, discovered long ago by the early goldsmith-bankers, that only a small proportion of the money left by depositors is demanded at any one time, and that, provided a sufficient reserve of legal tender is maintained for the satisfaction of all current and probable demands, the remainder of such money can be lent out at interest, or used to discount bills, or invested in various forms of securities yielding a profitable return.

#### A Bank's Balance Sheet

By law, all registered joint-stock banking companies must draw up a balance-sheet in prescribed form *twice* in every year, exhibit a copy at the Head Office and every branch, and file a duly audited and authenticated copy with the Registrar of Companies on the First Monday in February and the First Tuesday in August each year.

Such a provision is clearly of great importance to all connected with a joint-stock bank, as it ensures not only the careful and punctual preparation of its figures, but also that any reputable bank will aim at placing before the public a statement that can be challenged, neither for its clarity and correctness, nor by reason of its disclosure of any financial weakness.

#### THE LIABILITIES OF A BANKER

In a bank balance-sheet or statement of accounts (*see specimen overleaf*), the left or *liabilities* side may be regarded as the side from which the business of the banker originates, as most of the liabilities represent the sums he has available for employment in his business as a lender of capital.

## NATIONAL PROVINCIAL BANK LTD.

The Share Capital of this Company is £60,000,000, divided into 600,000 "A" Shares of £5 each, 2,000,000 "B" Shares of £5 each, and 9,000,000 Shares of £1 each. The number of Shares issued is 600,000 "A" Shares of £5 each, 7,889,416 "B" Shares of £5 each, and 1,170,000 Shares of £1 each. Calls to the amount of 14/- per Share on the "A" Shares of £5 and of £1 per Share on the "B" Shares of £5 have been made, under which the sum of £8,309,416 has been received.

The 1,170,000 Shares of £1 each have been fully paid, for which the sum of £1,170,000 has been received.

## STATEMENT OF ACCOUNTS, 30th June, 1944.

LIABILITIES.	£	s.	d.	ASSETS.		£	s.	d.	Ratio to Current Deposit and other Accounts.
Capital paid up	...	...	...	Cash, Bank Notes and Balances with the Bank of England ...	...	55,505,199	9	9	10.5
Reserve Fund	...	...	...	Balances with, and Cheques in course of collection on, other Banks in the	...	21,195,904	7	9	4.6
Current, Deposit and other	...	...	...	United Kingdom and Ireland, and Cheques, Drafts, etc., in transit	...	23,743,353	10	10	4.5
Accounts	...	...	...	Money at Call and Short Notice	...	...	...	...	...
Amounts due to Subsidiary	...	...	...	Bills Discounted—	...	...	...	...	...
Companies	...	...	...	Bills payable by British Firms and Institutions in the	...	...	...	...	...
	...	...	...	United Kingdom and Treasury Bills	...	28,151,127	4	0	5.3
	...	...	...	Other Bills	...	22,077	11	10	31.8
Liabilities for Acceptances, Endorsements,	...	...	...	Treasury Deposit Receipts	...	...	...	...	...
etc., as per contra	...	...	...	Investments—	...	...	...	...	...
	...	...	...	British Government Securities and Securities	...	129,107,462	7	6	...
	...	...	...	guaranteed by the British Government	...	...	...	...	...
	...	...	...	Dominion and Colonial Government Securities and	...	1,789,102	16	2	...
	...	...	...	Securities of British Public Boards and British	...	987,912	13	3	...
	...	...	...	Municipal Corporations	...	...	...	...	...
	...	...	...	Other Investments including Shares in other Banks	...	...	...	...	...
	...	...	...	(There is a contingent liability for Uncalled Capital	...	...	...	...	...
	...	...	...	in respect of a portion of these Investments.)	...	131,884,477	16	11	24.9
	...	...	...	12,000 Shares of £50 each, fully paid, in Lloyds and	...	600,000	0	0	1
	...	...	...	National Provincial Foreign Bank Ltd., at cost ...	...	...	...	...	...
	...	...	...	Investments in Subsidiary Companies at cost or under—	...	2,000,000	0	0	...
	...	...	...	£1,000,000 Stock in Coutts & Co.	...	514,000	0	0	...
	...	...	...	50,000 Shares of £5 each, fully paid in Grindlay &	...	...	...	...	...
	...	...	...	Co., Ltd.	...	...	...	...	...
	...	...	...	Other Subsidiary Companies (written down to nil)...	...	2,514,000	0	0	5
	...	...	...	Advances to Customers and other Accounts	...	106,362,802	3	5	20.1
	...	...	...	Amounts due by Subsidiary Companies	...	...	...	...	...
	...	...	...	Bank Premises at cost, less amounts written off	...	106,362,802	3	5	20.1
	...	...	...	Liabilities of Customers for Acceptances, Endorsements, etc., as per contra	...	10,991,602	0	8	—
	...	...	...		...	£559,317,752	0	1	—



## Capital Paid up

This item represents the amount invested in the bank by its shareholders. The investors or shareholders, by providing the capital, are the proprietors of the concern, and the amounts owing to them cannot be paid in the event of liquidation until all other claims have been satisfied.

The Registered Capital (sometimes called the Authorized or Nominal Capital) is the *total* amount of capital which the bank has power to issue (£60,000,000 in the balance-sheet given). It is to be distinguished from the *Subscribed* or *Issued Capital*, which is that sum applied for by the public and allotted by the directors of the company to the shareholders.

It is not unusual for only a part of the Subscribed Capital to be "called up". Thus, for each £10 share taken up, the original shareholders may be asked to pay the bank only £3 in cash, in which case the *Paid up Capital* would represent only three-tenths of the Subscribed Capital. The remaining seven-tenths is then described as *Uncalled Capital*, and this may be further subdivided into (a) *Callable Capital*, i.e., a proportion (for example, three-tenths of the original Subscribed Capital) which the directors may call at any time they deem fit, subject to any conditions in the company's Articles of Association, and (b) *Reserve Capital*, i.e., the remaining balance of four-tenths, which may be called up by the directors only in the event of the liquidation of the bank. Most joint-stock banks have established such a Reserve Capital, and by so doing have materially strengthened the security available to their depositors.

## Reserve Fund

Whereas the Reserve Capital is a contingent fund to be drawn from the *shareholders only in the event of liquidation*, the Reserve Fund is an accumulation in the hands of the *company* of sums allocated from the bank's profits and invested in first-class securities.

The Reserve Fund is available to be drawn upon at any time in the event of the bank's incurring heavy unexpected losses, and, although it thus provides an additional safeguard for the bank's customers, it belongs to the shareholders or proprietors of the bank, and may be drawn upon for their benefit to finance the issue to them of shares on bonus terms or to equalize the dividends paid as between one year and another. (The Reserve Fund is, in fact, a surplus gradually built up by careful management and represents the excess of the value of the bank's assets over its total liabilities, including its liability to its shareholders for capital paid up and for undivided profits.)

## Current, Deposit, and Other Accounts

This item is by far the largest, and represents the total sum deposited with the bank by its many customers on current and deposit accounts. ✓ Deposit accounts bear interest and are subject to an agreed notice of withdrawal, whereas current accounts usually earn no interest and are repayable upon demand.

The item also includes as "Other Accounts" any other credit balances in the bank's ledgers, such as the balances of its Unclaimed Dividend Account and Unclaimed Interest Account, together with any hidden "Reserve Accounts" which the bank may choose to maintain for its own purposes and, usually, the balance of the bank's Profit and Loss Account.

## Liabilities for Acceptances, etc.

The total under this heading represents the liability of the bank in respect of bills of exchange it has accepted or indorsed for the accommodation of its customers. As the latter are liable to recoup the bank for any loss it may suffer by thus lending its name, the amount is "offset" by a corresponding item on the other side of the balance-sheet.

In many bank balance-sheets, this item also includes the bank's contingent liability in respect of confirmed credits, forward exchange contracts and other engagements entered into by the bank on behalf of customers. Sometimes, however, these are shown separately as "*Engagements*".

## THE ASSETS OF A BANKER

The right or *assets* side of the balance-sheet shows how the bank employs the sums entrusted to its keeping by its customers and shareholders.

The assets are arranged in order of *liquidity* or realizability, so that customers and others can estimate the bank's strength and stability at a glance by observing the proportion of *liquid* assets maintained by the management. Thus "Cash" always appears first, while the item "Bank Premises", representing assets not readily convertible into money, usually figures last.

## Coin, Bank Notes, etc.

Every bank maintains at its head office and at each branch a sufficient reserve of legal tender to meet all probable demands. These cash holdings are the bank's "first line of defence", and they include, as a rule, the bank's "Balance at the Bank of England" (i.e., the bank's surplus funds on deposit), which is generally regarded as equivalent to cash.

Until recent years the amount shown in the second item as "Balances with Other Banks, etc.", was generally included in one sum with the cash holdings. As in ordinary circumstances there is little doubt as to the complete and instant realizability of the sum shown under this heading, the item forms part of the Bank's first line of defence.

### Money at Call and Short Notice

The keeping of an adequate cash reserve is necessary for a banker's daily business and for the maintenance of his stability. But cash kept in a safe or on current account with another bank earns nothing, so bankers sought some method of loaning which, while it ensured that the funds would be readily available if required, would provide at least some return on the money employed.

Such an outlet was found in the London Money Market, where numerous bill brokers, discount houses and stock exchange operators are ready to borrow large sums of money against good security, for short periods, at a low rate of interest, and subject to repayment at call or after an agreed number of days' notice. Money thus lent is a bank's "second line of defence", and is secured by the deposit of first class bills, Treasury Bills or other securities.

### Bills Discounted

A bank's "third line of defence" consists of bills of exchange discounted or negotiated for customers, or purchased in the Money Market.

✓ "Discounting a bill" means purchasing the bill at its face value (*i.e.*, the sum for which it is drawn) *less* the interest on the amount of the bill for the time it has to run before it falls due for payment. Thus a bill for £100 which is payable in three months is worth £99 to a banker if interest is reckoned at 4 per cent. per annum.

Normally, a joint-stock bank's holding of discounts consists partly of ordinary trade or commercial bills drawn on British firms and discounted by the bank for customers (including bill brokers). A further proportion comprises "bank paper", *i.e.*, bills drawn, accepted or indorsed by reputable banks in this country, while a considerably smaller amount (included no doubt as "other bills" in the above balance-sheet) represents bills drawn on firms and banks in other countries.

In addition, the total of Bills Discounted includes a considerable sum in British Government Treasury Bills, *i.e.*, promises by the Treasury to repay stated sums at the expiration of a given period, usually three or six months.

For various reasons, first-class bills of exchange are frequently described as the ideal form of investment for a banker's surplus funds. Bills are payable *in full* at the expiration of comparatively short periods, when the banker is reasonably sure of an automatic return of his cash.

As both bills of exchange and Treasury Bills can be obtained for varying sums, large and small, and for varying periods before they fall due, the banker can choose such bills as suit him best. Moreover, he can without difficulty increase his cash reserves by simply refraining from discounting further bills from time to time as his holdings fall due for payment, and he can so arrange his investments in bills that they mature and increase his cash balance at those times when he most requires additional funds, *e.g.*, at the turn of the quarter or when he has heavy dividends or other payments to make on behalf of his customers.

The foregoing items of the balance-sheet comprise the banker's *liquid assets*. Those which remain represent the more permanent means of employing his funds, and include items upon which it would be dangerous to rely in emergency for money wherewith to meet the demands of customers for repayment of their deposits.

### Treasury Deposit Receipts

This item is the bank's holding of Deposit Receipts issued by the Treasury in respect of advances made by the bank to the Treasury (usually for six months fixed, at low interest —  $1\frac{1}{2}$  per cent. at the time of writing).

### Investments

These include the bank's investments in British and Colonial Government securities, in British municipal and railway stocks and loans, and in affiliated banks, *i.e.*, smaller banks intimately associated with the larger concern which holds a large part of their capital.

In some balance-sheets, part of the total under the heading "Investments" is described as "lodged for public accounts". This means that, in accordance with law, investments to the amount indicated are registered in the names of joint trustees (including representatives of the bank), and are specially held (or "car-marked") as security for the due repayment of public money lodged with the bank on account of government departments or local authorities.

While Investments are correctly regarded as a bank's fourth line of defence, they are difficult to realize in emergency, for it is usually at those periods when cash is most urgently needed that securities are unsaleable, or saleable only at considerable loss. If, during a period of emergency, all the big banks endeavoured to

realize their investments, there would be a heavy fall in security prices, which would be accentuated by sales of investments by stock exchange operators who were unable to renew their loans. Furthermore, the selling of large amounts of securities by a large bank would not only be dangerous as giving rise to suspicions of weakness, but would also serve to intensify any general lack of confidence that might exist.

### **Advances to Customers**

Under this heading are included advances made by the bank to its customers as fluctuating overdrafts on current account, and as fixed loans on loan account. The majority of advances are repayable on demand or at short notice, but only a small proportion of the large total under this heading can be turned into cash at a moment's notice or even within a reasonable period. The trader who has borrowed from the bank in order to purchase additional stocks, or a private individual who has obtained an advance in order to meet his commitments, must be given reasonable use of the loan before repayment is demanded. Indeed, it is difficult enough for many such customers to wipe off their indebtedness even within the period that is usually allowed. At all events, no bank of repute can rely for funds in an emergency on a wholesale demand on its customers to repay their advances.

### **Bank Premises**

The premises of a bank are among its least realizable assets, for, apart from the fact that the large bank offices could only with difficulty be converted to other uses, assets of this character can at best be realized very slowly. The value of bank premises as stated in the balance-sheets of our banks is without doubt far below their true worth and constitutes another hidden reserve. The premises of the Bank of England do not appear in its balance-sheet at all, although they are worth several millions sterling.

### **Liabilities of Customers for Acceptances, etc.**

This is in the nature of a contra entry to the similar item which appears on the other side of the balance-sheet, and indicates that, although the bank has assumed liability in respect of its signature on bills to the amount stated, it is secured by the undertakings given by its customers to reimburse it for any amounts it has to pay in respect of the bills.

### **Other Items which Appear in Bank Balance-Sheets**

Bank balance-sheets sometimes include other items in addition to those discussed in the foregoing paragraphs.

**NOTES ISSUED OR NOTES IN CIRCULATION.**—This item, in the case of the Bank of England and Scotch and Irish banks, represents the amount of notes issued by the bank concerned.

**REBATE ON BILLS NOT DUE.**—Such large sums are invested by banks in discounting bills that a large proportion of the discount is unearned at the time a bank's half-yearly balance-sheet is made up. Accordingly, the banker adjusts his profits by crediting "Rebate on Bills not Due Account" with the total amount of discount unearned at the date of the balance-sheet, and the total is included in the balance-sheet under the heading "Rebate on Bills not Due" on the liabilities side. When this item does not appear in the balance-sheet, the total of the item "Bills Discounted" is adjusted to allow for unearned discount.

**BALANCE OF PROFIT AND LOSS ACCOUNT.**—This may be included in the general total of current and deposit accounts, or shown as a separate item on the liabilities side. The balance belongs to the bank's shareholders, and represents the undistributed profit after payment of the last dividend and after providing for depreciation and allocations to reserves and other funds.

## THE TEST OF A BANK'S STRENGTH

The balance-sheet of a joint-stock bank is of great importance, not only to its numerous shareholders and officials, but also to the multitude of depositors who have entrusted their savings to its keeping and to the body of potential customers represented by the public in any places where the bank's business is conducted. The published balance-sheet is the best means by which the bank's soundness and stability can be judged, but to do this it is necessary to understand not only the significance of the figures but also their true relation to one another.

### What is an Adequate Cash Reserve?

Every banker is influenced by two distinct forces pulling in opposite directions. On the one hand, the necessity of maintaining always an adequate cash reserve constantly dictates caution; on the other hand, the desire to make profits for the bank shareholders is a strong inducement to lend freely. What, then, is an adequate cash reserve?

Clearly, much depends upon the class of business conducted. Banks with large deposits at notice can safely carry smaller reserves than those which have a greater proportion of money on current account, or on deposit subject to withdrawal on demand. Again, banks which are essentially deposit or savings banks must maintain a higher percentage of cash than banks (such as the agricultural

and credit banks of the Continent) which are formed and capitalized specially for the purpose of granting loans against land and providing capital for industrial undertakings.

A bank operating chiefly in a rich residential suburb, where payments are made largely by cheque and frequently to recipients in other areas, requires proportionately less cash in its tills than a bank in a busy seaside resort where money is being spent freely and cash is being continually demanded by visitors. Similarly, a joint-stock bank whose business lies largely in agricultural districts does not as a rule require so high a proportion of cash as a bank which operates principally in busy industrial areas, where money is turned over much more quickly and large wage and other payments are made in cash.

The amount of a banker's reserve varies considerably with the state of public confidence and with the general conditions of trade. In times of depression and business uncertainty, when confidence is at a low ebb and people lack faith in the future, greater cash reserves are maintained by the banks than in prosperous times, when faith runs high, when trade shows promise and when many customers, intent upon "making hay while the sun shines", apply to the banks for accommodation to finance new business ventures or to extend their existing operations.

But whatever the conditions of trade or the circumstances of the bank's business, a sufficient reserve of legal tender must be maintained to meet all current and probable demands, normal and abnormal, for the bank's reputation for solvency would be injured if it were unable at once to meet its obligations.

### Proportion of Cash Held

There are a number of different ways of calculating what is known as a bank's *proportion*, or percentage, of cash held. One method is to take the total of the balance-sheet as 100, and to work out the amount of cash as a percentage of that total. This is tantamount to determining what proportion of a bank's total assets is represented by cash, and is frequently used in comparative statements drawn up to indicate the distribution of the assets and liabilities of different banks.

Another method is to take the proportion of the bank's cash to the total of its liabilities on Current, Deposit, and Other Accounts; in other words, to compare the banker's cash (his first line of defence) directly with the source of his most frequent and urgent demands for payment. This is the method adopted by the large joint-stock banks, which normally keep their proportion of cash to deposits at about 10 per cent.

Joint stock bank branches normally maintain a proportion of from 5-7 per cent. of cash to their total liabilities.

## Proportion of Advances to Liabilities

The second basis for estimating the strength of a bank is the proportion of the total of its loans and advances (excluding discounts) to the total of its liabilities on current and deposit account, or alternatively, to its total assets. These proportions indicate whether the bank is maintaining a sufficiently liquid position, or whether it is "overlending", *i.e.*, locking up too great a proportion of its funds in loans of a more or less fixed character.

What proportion is maintained between advances and liabilities necessarily depends on the nature of the bank's business, but it is said to be an established principle among British banks that a bank's advances, *excluding* bills discounted, should not greatly exceed 50 per cent. of its total liabilities on deposit and current accounts. As a result of conditions arising out of the world war, and, in particular, the vast increase in bank deposits, the proportion has fallen to less than half this figure.

## Quality of a Bank's Loans and Investments

Apart altogether from the relative proportion of the various items in a bank's balance-sheet, the *quality* of a bank's loans and investments is clearly of importance, although it cannot, of course, be determined from the balance-sheet.

The strength of any institution as indicated by its balance-sheet would obviously be merely ephemeral if its investments were largely of a speculative character, or if its loans were made without adequate security. Moreover, it is clearly more advantageous for a bank's loans to be well distributed both in amount and in area, than to be made in large amounts to a comparatively small number of customers or confined mainly to a particular area or industry, either of which may be subject to a general disaster or acute depression.

Partly as a result of the great development of the branch banking system in this country, but mainly as a result of deliberate policy, our large banks do not lock up their resources to any great extent in any one industry or in any one area. Their risks are well spread over a wide field, while the capital they supply is lent for relatively *short periods*, *i.e.*, they supply *commercial* rather than *investment* capital. If a manufacturer applied to a bank for a loan of £30,000 for the purpose of erecting a factory and installing machinery and plant, the request might possibly be refused. But if the same manufacturer applied to the bank for a temporary overdraft to pay for raw materials or to finance a business deal, the accommodation would probably be granted if satisfactory security were forthcoming.



## PART II

# BANKER AND CUSTOMER

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### CHAPTER 4

#### THE CUSTOMER'S ACCOUNT

ALTHOUGH an understanding of the exact meaning of the term "customer" is of great importance to bankers, there exists no legal definition. No definition is given by the Bills of Exchange Act, 1882, while the legal decisions on the point are so conflicting as to afford little clear guidance. Probably the nearest approach to a definition was the statement of Lord Davey in *The Great Western Railway Company v. London and County Bank*, 1901, to the effect that a customer "is a person who has some sort of an account with a banker". From this it follows that anyone may become a customer of a bank by opening a deposit or a current account. (See also Chapter 16.)

As a banker runs certain risks in his dealings with a customer, it is usual for him when opening an account to protect himself by requiring some form of introduction from anyone not already known personally or by repute to the manager or a member of the staff. Such introduction usually consists of a reference to some other person known to the bank, or to some other bank, or, in the case of an employee, to the prospective customer's employer.

A cheque-book should not be issued to a prospective customer until a satisfactory introduction has been received, otherwise innocent third parties may suffer through accepting 'cheques against which no funds are held at the bank. Failure to obtain and follow up a reference may render the bank liable for negligence in respect of cheques collected for the new customer.

New customers should attend personally at the branch, wherever possible, so that they can be interviewed by the manager or a senior official, who should explain to them the methods and terms of the bank's business, and, in particular, the charges to be made by the banker for the conduct of the account, and the rate of interest which is to be charged or allowed, as the case may be. By a personal interview, the manager is in a better position to assess the prospective customer on a monetary basis.

#### Obtaining Specimen Signatures

The next step is to obtain, in what is known as the Signature Book (or upon a specially ruled card, if a card-index system is maintained) the signature or signatures of the person or persons

who are to operate the account. As a rule, separate books or separate card indexes are kept for current and deposit account signatures, but in all cases particulars of the customer's full name, occupation, and address are recorded.

Sometimes the person opening the account is merely an agent acting for the purpose on behalf of the prospective customer, or he may be acting on behalf of himself and another person or persons. Thus, a partner may be authorized to open an account on behalf of his firm, or the secretary on behalf of a limited company. In such cases, specimen signatures of all those who are to sign cheques must be obtained, and it is best that the persons concerned attend at the bank for the purpose. Where this is not possible, the manager should take the earliest opportunity of personally meeting them.

If a customer wishes to have his cheques cashed at any other branch or bank, a second specimen of his signature must be taken for dispatch with the necessary authority to the bank or branch concerned. The authority must clearly state the amount or limit required, the period for which the facilities are to be granted, and whether the customer's cheques in favour of third parties are to be cashed.

### Banking Account Mandates

If a customer wishes a certain person or persons to draw cheques on his account and/or to indorse cheques or bills in his name, the necessary *mandate* will be taken on the bank's prescribed form, and arrangements will be made for the bank to be supplied with a specimen signature of each person so authorized, who should be required to call personally at the bank, where this is possible, so that he may thereafter be identified without difficulty by the bank officials.

In the absence of a special request from the customer to the contrary, a mandate giving an agent authority should be worded so as to apply whether the account is in credit or is overdrawn, otherwise difficulty may be experienced in holding the customer liable for any overdraft created by cheques drawn by the agent. It must be remembered that an authority to *indorse* does not sanction the *drawing* of negotiable instruments; that an authority to draw and indorse *cheques* does not extend to the drawing, accepting, or indorsing of *bills of exchange* other than cheques; that an authority to draw cheques does not connote authority to overdraw; and that a mandate authorizing the indorsement and/or signing of cheques does not imply a power to pledge securities in respect of any advance created on the account.

The signatures of all persons entitled to sign cheques on a joint account (*i.e.*, the account of two or more parties), or on the account of a partnership, company, or corporation, will be obtained

by the bank in a mandate, embodying definite instructions as to how and by whom cheques on the account are to be signed. Thus, a mandate in respect of a joint account may provide that cheques shall be drawn by any one of the parties; that of a partnership may decree that the signature on cheques of one or some of the partners will be sufficient; while that of a joint-stock company may instruct the bank to pay cheques signed by any two of its directors and countersigned by the secretary.

All responsible officers of the branch should be acquainted with the mandates concerning the accounts, and the essential particulars affecting each account should be inserted or referred to on each page or sheet of the account in the ledger.

### Cheque Book Register

When all formalities are completed and the prospective customer's references are found to be satisfactory, the banker will open the account and instruct the customer concerning its method of operation. In the case of a current account, the customer will be supplied with a *cheque book*.

All cheques (unless exempt) bear a 2d. stamp and are numbered consecutively for identification purposes. A record of all cheque books issued is kept in the *Cheque Book Register*, in which cheque books are listed in groups according to their size and kind, and columns are provided for the numbers of the cheques, the name of the customer and the date of issue. It is thus possible to ascertain the value of stamped cheques on hand at the branch at any time and, in the event of a query arising concerning a particular cheque, to trace the customer to whom the cheque was issued.

Banks never issue cheque books to unauthorized persons, and, unless the customer attends in person at the bank, they require his signature to a special requisition form which is included near the end of each cheque book, so that it may be completed and forwarded to the bank before the customer's supply of cheques is exhausted.

### Relation between Banker and Customer

The relationship between a banker and his customer is primarily that of *debtor and creditor*, the banker being under the obligation to honour the customer's cheques up to the amount of the customer's available credit balance on current account, or up to the limit of any overdraft the banker has agreed to allow, provided the cheques are in proper form and that no legal bar exists to prevent the banker from paying them. Where a banker allows his customer to overdraw his account, that is to say, to draw cheques without having the money in the account to meet them, the banker is the creditor and the borrowing customer the debtor.

This duty of the banker arises out of two implied agreements between the parties. The first is that the banker will repay what he borrows from his customer provided the latter makes a properly written demand for repayment at the branch where the account is kept. The other is that the banker will not refuse to pay cheques except upon reasonable and proper grounds ; if he does so, the customer may be able to claim damages as compensation for any injury he has suffered through the dishonour of his cheques.

The banker's duty to pay cheques drawn by his customer does not apply to bills of exchange other than cheques, or to cheques issued by the customer against a deposit account. Although bankers do sometimes for the convenience of their customers pay cheques drawn against funds on deposit account, they are entitled to refuse to do so.

A banker is not a *trustee* of the money left with him by the customer, nor is he an *agent* responsible for its disposal, although he often undertakes duties that make him both agent and trustee for his customers. Money left with a banker on deposit or current account is *at his absolute disposal*, to do with as he pleases. It is really *lent* to him by the customer, subject to the understanding that the money, if left on current account, will be repaid on demand, or, if left on deposit account, after agreed notice has been given by the customer.

### Necessity for Demand for Repayment

The debt created by the deposit of funds with a bank resembles any other debt in that, if the bank were to become insolvent, the customer would have no rights other than those of an ordinary creditor. He would have to prove in the bank's winding-up for the amount due to him.

The debt due by a banker to his customer differs, however, from an ordinary commercial debt in a very important respect that was not clearly recognized until the case of *Joachimson v. Swiss Bank Corporation*, 1921. In the case of an ordinary debt, a *request for payment is not necessary* before the creditor can take steps to enforce payment against the debtor ; in fact, it is the duty of the debtor to seek out his creditor and pay him. But it was decided in the above case that, as regards a debt due by a banker to his customer, a *demand on the bank for repayment is necessary* before the debt becomes what is known as "owing or accruing due".

If this were not so, a banker owing money to a customer would have the right to tender to him the full amount of the credit balance *at any time or at any place*, thus summarily closing the account and possibly injuring the customer's credit through the subsequent dishonour of his cheques.

On the other hand, the customer's demand for repayment must be made in accordance with the terms on which the money was left with the banker. In the case of a *current* account, the demand for repayment (*i.e.*, by drawing a cheque or cheques) must be made only on the branch where the account is kept and then only during recognized business hours. In the case of a *deposit* account, the giving of notice, where notice is stipulated for, and the production of the deposit book or deposit receipt, are *conditions precedent* to the right of the customer to demand repayment of the balance due to him.

### Current Accounts and the Limitation Act, 1939

The decision in the *Joachimson Case* is important in its bearing upon the effect of the Limitation Act, 1939 (commonly known as the "Statute of Limitations") on the debt owing by a banker to his customer. This statute (which re-enacted provisions of earlier Acts) provides that an action to enforce a simple contract debt must be commenced before the expiration of *six years* from the time when the right of action first arose, otherwise the debt becomes "statute-barred"; *i.e.*, it cannot be enforced by law.

The prescribed period begins to run from the date when the debt is first payable, or from the date of the last written acknowledgment of the existence of the debt, importing a promise to pay, made by the debtor or his duly authorized agent, or of the last payment on account of the principal amount owing or on account of interest on that principal.

As it was decided in the *Joachimson Case* that the debt owing by a banker to a customer does not become *due and payable* until the customer has made a specific demand for repayment, the six years required by law do not begin to run until such a demand is made by the customer.

Actually, of course, no reputable bank would ever take advantage of the above legal provisions to refuse payment of a customer's balance once a demand therefor had been made by the person entitled to the money.

In the reverse circumstances, where the customer is indebted to the bank for a loan or overdraft, the relationship between them is *essentially* that of debtor and creditor and the principle laid down in the *Joachimson Case* does not apply. So, in the absence of any express agreement providing that the bank must demand repayment or give specified notice to call in the advance, or that the customer shall repay at a specified date or time, the debt due by the customer is immediately "accruing due" and liable to be called for by the bank at any time after the date of the advance, and the period fixed by law begins to run in the customer's favour *from the date of each advance* (*Parrs Bank v. Yates*, 1898). This means that the

customer cannot be sued for repayment of any advance if, for six years after the date of such advance, he has *not* made any acknowledgment of the obligation or repaid any part of what is due, or *paid* any interest thereon (not merely been *charged* with interest), and the banker has failed to commence proceedings for recovery.

To protect banks against the operation of the Statute in this way, all bank forms of charge over security state that the advance is to be repayable on demand or a number of days (*e.g.*, three days) after demand, so that the time will not begin to run in the customer's favour *until the bank has demanded repayment*.

In the unlikely event of a banker having failed to protect himself by a form of charge providing for repayment on demand, or some days after demand, and so debarring himself from suing for the recovery of a debt which had been unacknowledged for more than six years, the banker would not be debarred from reimbursing himself by realizing any securities of the debtor which had come into his hands in the ordinary course of business. And a banker would not be debarred from suing a person who had given a continuing guarantee for the due payment of such a debt, if the guarantee contained an undertaking by the surety to repay the advance "on demand", or "three days after demand", for in such cases the time would not begin to run until the banker made an *express demand* for repayment by the guarantor.

### **Appropriation of a Customer's Payments-in**

A customer who has several accounts with the same bank can stipulate that funds paid in to his credit are to be placed to whichever account or accounts he may select, or he may insist that some or all of the money is to be specifically applied, *e.g.*, to meet certain cheques, or to pay certain bills. This is called *appropriation of payments*. If the banker does not agree to such an appropriation, he must refuse the amount tendered to him at the time of the tender.

In the absence of appropriation by the customer, the banker has the right to apply any funds paid in to reduce any debt owing to him by the customer, including even a debt that is statute-barred. Once such an appropriation is made and communicated to the customer, it is binding upon both parties, and cannot be varied or revoked by either without the consent of the other.

### **Rule in Clayton's Case**

When money is paid in to a current account and no appropriation is made at the time by either banker or customer, it may become necessary to determine how the money shall be deemed to have been applied. The general rule of law in this respect is known as the *Rule in Clayton's Case*, 1816, which provides that, where there is a *current* account between two parties and there has been no

appropriation by either party of the items therein, the *money first paid in shall be deemed to have been first drawn out, i.e.,* the credits in order of entry in the account shall be deemed to have discharged the debits in the order in which they appear.

In the absence of agreement to the contrary, therefore, the Rule will operate against a banker who allows a customer to overdraw against security, since any payment into the account will be deemed to reduce the original overdraft, and any fresh advances will be unsecured.

This principle is of particular importance in its bearing upon the rights of a banker under a guarantee, or against a deceased's estate, or against a partnership the constitution of which has been changed, for, unless in such circumstances the banker takes steps to protect himself against the operation of the Rule, he may be unable to recover the whole amount advanced. To protect himself against the operation of the Rule—which applies only in the case of a *current or running* account—the banker must *break* the account, *i.e.,* refrain from making further entries thereon, and open a new account, informing the customer or his legal representative of the new arrangement.

### Duty of Secrecy concerning a Customer's Affairs

It is an implied term of the *contract* between a banker and his customer that the former will not disclose information concerning his customer's affairs (including the state of his account) except upon reasonable and proper occasion. In the case of *Tournier v. National Provincial Bank*, 1924, Lord Justice Bankes suggested that there are four reasonable and proper occasions upon which disclosure by a banker is permissible :—

- (1) where there is compulsion of law ; *e.g.,* where under the *Bankers' Books Evidence Act*, 1879, a banker is ordered by the Court to produce his books in Court, or to produce a certified and duly sworn copy of an entry or entries therein.

By law, a banker must also disclose a bankrupt customer's affairs to the Official Receiver or the debtor's trustee in bankruptcy ; and the affairs of a deceased customer to his personal representatives.

- (2) where there is a duty to the public to disclose ; *e.g.,* where disclosure is necessary in order to avert a danger to the State.
- (3) where the interests of the bank require disclosure ; *e.g.,* where a banker issues a writ claiming payment of an overdraft, when the amount due must be stated in the writ.
- (4) where there is express or implied consent of the customer ; *e.g.,* where the customer gives the name of his banker as a reference as to his financial standing.

The practice among banks of giving *confidential opinions* to one another concerning the credit and standing of customers is so well established that probably no customer could successfully object to it, unless he had expressly instructed his banker not to give such opinions. Indeed, a customer in opening an account may be regarded as impliedly agreeing that the banker may give such opinions when asked for, though such implied consent would not extend beyond an opinion of *a general nature*, embodying the banker's considered and honest view of the general business reputation and financial position of his customer.

A banker is under no duty to give information other than is derivable from the books of account before him, or from his personal knowledge gained in his capacity of banker.

### Banker's Right of Set-off

Where a customer has two accounts in the same right, one in credit and the other in debit, and *there is no agreement, ear-marking, or course of business indicating an obligation to keep the accounts separate*, the banker is entitled to combine the accounts, *i.e.*, to set-off the credit balance against the debit balance.

The banker need not give notice of his intention to combine accounts if the customer's account is *stopped* by his death, bankruptcy, or insanity, or by the service of a garnishee order (see below), for in any such cases combination is required by operation of law to determine the net liability of the customer or bank.

In any other circumstances, notice of the intention to set-off should be given to the customer, for a banker who sets off a credit balance against an overdraft and, without reasonable notice, dishonours cheques drawn on the credit balance will probably render himself liable to an action for damaging the customer's credit.

Where the right to combine exists, it may be exercised only if the accounts are *in the same right, i.e.*, any credit balance involved must be the absolute property of the customer who is indebted to the bank and not be merely in his legal ownership as trustee. Thus, a current account and a deposit account in the same name or names may be combined, as also may accounts of the same customer headed respectively "No. 1 Account" and "No. 2 Account", *providing* that the banker has no actual or constructive notice that one of the accounts is connected with a trust or agency exercised by the customer. But an account the heading of which indicates that it is a trust or agency account (*e.g.*, "Golf Club Account", "Y.M.C.A. Account", "The Accrington Trust") cannot be set-off against a purely private account of the same customer.



For the same reason, a banker cannot in the absence of express agreement set off a partner's credit balance against a debt due by his firm, or *vice versa*. Nor can he combine the private account of a customer with a joint account upon which the customer is one of the parties, nor a debit or credit balance on the account of a deceased customer against a credit or debit balance standing in the names of his executors or administrators. Finally, a banker cannot combine the balances on different accounts of a public authority.

Usually, a banker who wishes to have the right to set-off two accounts takes from the customer an express authority to that effect in the form of a Set-off Letter.

### “The Usual Course of Business”

In all his dealings with a customer, the banker must act in accordance with what may be described as “the usual course of business”, for, if he fails to do so, he may render himself liable to his customer for any loss or damage that may arise through his neglect of the normal practice. What is the usual course of business will depend on the general custom of bankers in this country, not on the usual practice of any particular bank or group of banks.

### Garnishee Orders and the Customer's Account

A GARNISHEE ORDER is an order of the Court in favour of a creditor who has obtained judgment against his debtor, attaching funds of the debtor in the hands of a third party, *the garnishee*.

Garnishee proceedings in the High Court involve two distinct steps. The first is the issue by the Court of a *Garnishee Order nisi*, which attaches the funds in the hands of the garnishee but gives him an opportunity of appearing before the Court to show cause why the funds in his hands (or sufficient to meet the debt, plus costs) should not be paid to the judgment creditor. The second step is taken when the order is made *absolute* by the Court, and the garnishee is ordered to pay the judgment creditor either the whole of the funds in his hands or enough to satisfy the judgment.

A garnishee order attaches *all* debts owing or accruing due, so that a customer's balance on current account is attached, as the order in itself is deemed to constitute a demand for repayment, such as is required by the decision in the *Joachimson Case* (see p. 28). This is so even if the balance is considerably more than the amount of the judgment debt. Consequently, a banker who is served with a garnishee order must not interfere in any way with the balance on the relative account; he must return unpaid any cheques subsequently presented even if they were issued before the date of the order, and even if they are covered by the balance in excess of the amount garnisheered.

If the balance to the customer's credit is *less* than the amount of the judgment debt, the banker can dispose of the matter by paying the balance to the judgment creditors' solicitors when the order absolute is made, if necessary exercising his right to deduct from the balance any debt due to him at the time the order *nisi* was served on him.

If the balance to the customer's credit *exceeds* the judgment debt, the usual course (particularly if the banker is anxious to safeguard his customer's interest) is at once to inform the customer that the garnishee order has been served, that the balance on his account cannot be touched until the judgment is satisfied, and that, in the meantime, all his transactions must pass through a new account. If, in these circumstances, the order is made absolute, the banker should pay the required amount to the judgment creditor, and such payment then operates as a valid discharge as between the bank and the customer.

Since a garnishee order can attach only debts that, at the time of service of the order, are "*owing or accruing due*", it cannot touch any amounts which may *in the future become due* by the banker to the customer (e.g., the proceeds of bills or coupons in process of collection, or of securities in process of realization).

If at the time of service of a garnishee order the customer's account is in debit, the order does not apply, though the customer should be advised of its service. Operations on the account may be continued, and future credits are not attached by the order.

A garnishee order does not attach a balance on a deposit account subject to notice, unless the notice has already been given by the customer when the order is received by the banker, in which case the debt will be *due* if the notice has expired, and *accruing due* if the notice is still running. And it does not affect money on deposit receipts repayable upon fulfilment of certain conditions—such as the giving of notice, or the return of the receipt—unless those conditions have been fulfilled. But it does attach moneys on deposit account repayable on demand, or at call, or on a fixed date, for, in such cases, the funds are "*due or accruing due*".

### Limited Garnishee Orders

To avoid the inconvenience caused by the stopping of a large account for the service of a small debt, the Court may issue a *Limited Garnishee Order*, which attaches all sums due from the bank to the judgment debtor not exceeding a specified sum. On receipt of such an order, the bank should transfer the amount specified (plus estimated costs) to a suspense account, leaving the balance on the main account available for the customer's use.

## County Court Garnishee Summons

A garnishee summons issued by a County Court has the same effect as a garnishee order issued by the High Court, except that the garnishee may, up to five days before the hearing of the summons, pay the amount of the summons, together with costs and fees, into Court and thereby obtain a discharge. With a garnishee *order*, no payment can be made until the order absolute is issued.

## Customer's Pass-book or Statement Sheet\*

A banker should ensure that all entries in his customer's pass-book are correct, for he may be involved in loss if a customer, in reliance upon incorrect credit entries in his pass-book, is induced to draw out more money than he would otherwise have done, or otherwise alters his position to his detriment.

It is no defence for the banker to prove that the customer has had an opportunity of examining his pass-book, for there is no *obligation* upon a customer to examine his pass-book or to ensure that pass-book entries are correct.

Moreover, a banker who discovers that he has wrongly credited an amount to the account of the customer will run considerable risk of being held responsible for injury to his customer's credit if, after discovering the mistake and before the error is communicated to the customer, he dishonours cheques drawn by the customer in reliance upon the position disclosed by the pass-book.

When cheques are wrongly debited to a customer's account, the customer can demand that his balance be restored, even if he has received his pass-book from the bank and has had an opportunity of verifying the correctness of the debits. And the banker cannot contend that his customer, by his silence or by refraining from criticizing the entries, has virtually adopted them as being correct.

In one case, a bank over a long period had paid various cheques bearing the forged signature of its customer, and, though the customer had from time to time obtained his pass-book, he had raised no objection to the debits relating to such cheques. The banker was unable to succeed in his claim that the customer had acted negligently and could be regarded as having induced the bank to pay subsequent forged cheques.

The true test would seem to be that the customer must act as a "reasonable man" would in the circumstances. Though there is no obligation to examine the pass-book, the Courts would probably hold that, *in cases where the pass-book had been regularly examined*, a greater degree of care would be required from a business man than from a private customer.

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\* Though the passbook is now practically superseded by the typed Statement Sheet, the same principles apply.

## Closing a Customer's Account

A customer may at any time close his *current* account either by withdrawing the balance if the account is in credit, or by paying the banker what is due, plus any accrued interest and other charges, if the account is overdrawn. He should, of course, make provision for any outstanding cheques, otherwise the bank is within its rights in returning any such cheques marked "Account closed".

A *deposit* account cannot be closed by a customer and the funds thereon withdrawn unless the requisite period of notice is given, and the deposit receipt (if any) is duly discharged and returned to the bank, though the bank may waive its right to notice and may accept an indemnity signed by a depositor who cannot produce his deposit receipt.

Without risking an action for damages for breach of contract, a banker cannot at any time summarily close a credit current account, pay the balance to the customer, and dishonour any cheques presented subsequently. The customer is entitled to have reasonable notice that the banker wishes the account to be closed; he should be advised in writing that no further credits will be accepted for his account, and that he should withdraw any balance standing to his credit, subject to his leaving with the banker sufficient funds to pay any outstanding cheques. What is reasonable notice is a question of fact, but in *Prosperity, Ltd. v. Lloyds Bank, Ltd.*, 1923, one month was considered insufficient notice in the circumstances of that case.

Similarly, a banker who wishes to close an *overdrawn* account must give his customer reasonable notice, and he must not dishonour a cheque drawn by the customer before notice, unless the agreed limit has been exceeded or would be exceeded by the payment of the cheque. If a fixed loan has been granted and the proceeds thereof credited to a current account, the customer is entitled to draw out the whole of the credit balance until the expiration of reasonable notice calling in the loan.

An account, whether in debit or credit, must be *stopped* on the death, insanity or bankruptcy of an individual customer, on the dissolution of a partnership customer, and on the liquidation (or winding-up) of a company customer.

The *stopping* of an account is to be distinguished from the *closing* of an account. An account may be stopped either by operation of law, as indicated above, or by some action on the part of the customer prejudicial to the banker's interests, and the account may be continued if the cause of the stop ceases to operate. When an account is closed, however, the relationship of banker and customer is finally terminated, so far as the closed account is concerned.

## Assignment of the Balance on an Account

If a customer assigns his credit balance to a third party, and due notice of the assignment is given to the banker, the banker must pay the balance to the assignee and to him *only, unless* (a) the banker has any right of lien or set-off in respect of the balance, or (b) the assignor gives him notice not to pay. In the former case, the banker can at once exercise his rights over the balance, paying the surplus (if any) to the assignee. But, in the latter case, if the assignee takes action to obtain payment, the banker may have to *interplead*, i.e., ask the Court to determine the ownership of the balance on the account.

The assignment of a balance on current account means that the contract between the banker and his customer is at an end, and that the assignee can give the banker an effective discharge which frees him from all future liability to the customer.

## Savings Bank and Home Safe Accounts

Banks offer facilities to encourage young persons and poorer people to save small sums through the medium of *savings bank* and *home safe* accounts. These accounts are the subject of special contract between banker and customer, and are not governed by the general rules that apply to ordinary deposit and current accounts.

*Savings Bank Accounts* are conducted in much the same manner as ordinary deposit accounts, but a fixed rate of interest (usually  $2\frac{1}{2}$  per cent.) is payable, while small sums up to about £5 are repayable without notice *at any branch* of the bank. A record of sums deposited is kept in a pass-book, which must be produced by the depositor on the occasion of each deposit or withdrawal.

*Home Safe Accounts* may be opened with a small initial deposit, usually of five shillings. A small safe is handed to the depositor, in which small savings are accumulated. The safe is taken at intervals to the bank to be emptied, when the contents are credited to the depositor's account and entered in a pass-book, on the production of which small amounts (usually up to a maximum of £5) may be withdrawn without notice *at any branch* of the issuing bank. As a rule,  $2\frac{1}{2}$  per cent. is allowed on these accounts up to £100, and 1 per cent. above that figure.

## PERSONAL CUSTOMERS AND PARTNERSHIPS

## Infants

THOUGH an infant, *i.e.*, a person under twenty-one years of age, is not liable on a bill of exchange, he can validly give a discharge for moneys paid to him or to his order, so that there is no risk in conducting a current account with an infant as long as it is kept in credit.

Although banks now open "Home-Safe" accounts even for the very young, they prefer not to open current and deposit accounts in the names of persons under sixteen years of age. The usual course in such cases is to open the account in the name of a parent, or guardian, marking it to indicate that it concerns the infant, as, for example, "Thomas Robinson, *re* John Henry Robinson."

As an infant cannot be held liable for a loan, a banker who makes an advance to an infant cannot enforce repayment of the money, or retain or realize any securities deposited by the infant in respect of the advance. The bank may, however, enforce its rights against an adult third party who has given a guarantee or deposited security in respect of the overdraft.

An infant may act as an agent, so that a banker is safe in accepting a written authority empowering an infant to draw or indorse cheques and bills, or to overdraw on his principal's account. An infant may be a partner in a firm and can bind his co-partners, but it is not usual to allow an infant to operate a partnership account except on specific authority from the other partners.

## Married Women

No difficulties arise in connection with the banking account of a married woman, whether it is kept in credit or overdrawn. If, however, a married woman offers to guarantee the account of her husband, the banker should make quite sure that she has personal means, that she realizes the implications of the step she is taking, and that she takes such a step of her own free will. The safest course is to ensure that, in the giving of the guarantee, she is advised by a solicitor who does not act for her husband.

Sometimes a woman receives from a trust an income that is subject to a protective trust so as to prevent her from borrowing against it in advance, in which case the banker cannot safely take a charge over such future income.

A married woman may act as an agent on behalf of another or others, *e.g.*, to draw cheques on an account. Moreover, she may be appointed as executrix, administratrix or trustee, and, if she undertakes such duties, her husband is not liable for any of her

acts or obligations in the performance of the executorship, administration or trust, so long as he does not interfere therewith.

### Lunatics and Drunken Persons

Any mandate is brought to an end by the insanity of the person giving it, so that a banker who pays cheques drawn by an insane customer pays without authority, though he is entitled to debit the customer's account with any cheque paid before the bank received notice of the insanity.

A contract entered into by a person when drunk is not binding on him as against anyone who knew he was drunk at the time the contract was made. Hence, if a drunken person wishes to cash a cheque, or sign a guarantee, or enter into any other transaction with a banker, the transaction should be postponed until the person is sober.

### Joint Accounts

A banker who opens a current account in the joint names of two or more persons who are not partners or trustees should take a mandate, signed by them all, embodying instructions as to how and by whom cheques and bills are to be signed and indorsed. The mandate usually indicates how the balance is to be disposed of in the event of the death of any party, but as it then automatically becomes inoperative, it can be taken only as an indication of the intention of the persons signing.

It is a rule of law that, on the death of any party to a joint account, the balance vests in the survivor. Hence, in the absence of any indication of a contrary intention, the banker may pay to the survivor and obtains a good discharge in doing so. If, however, the banker has any evidence that the balance is *not* intended to go to the survivor (*e.g.*, where an account in the name of husband and wife is opened for joint-housekeeping purposes and not to provide for the widow), he should not pay without the consent of the surviving party and of the personal representatives of the deceased party.

Joint account mandates usually include an undertaking by the parties to be *jointly and severally* responsible for any overdraft. Such an undertaking is essential if an advance is contemplated for, in its absence, the parties are only liable *jointly*. This means that if they are not all sued together, any party omitted from the action is released from liability and that, on the death of any one of the parties, his estate is freed from liability, the survivor or survivors alone being responsible for repayment of the advance. After an action is brought against joint parties *together* and judgment is obtained against them, there is no further right of action against them *individually* if the judgment against them all remains unsatisfied.

On receipt of notice of the insanity of a party to a joint account, the account should be stopped pending instructions from someone duly authorized to act, such as a receiver appointed by the Court in Lunacy.

If one party to a joint account becomes bankrupt, the banker should stop all operations on the account, and return all cheques thereafter presented. Operations on the account should again be permitted only after the receipt of instructions from both the solvent party and the trustee in bankruptcy of the insolvent party.

### Undischarged Bankrupts

A person who has been adjudicated bankrupt suffers from a number of civil and contractual disabilities until he obtains an order of discharge from the Court. From a banker's point of view, the most important disabilities are: (a) that an undischarged bankrupt must not obtain credit in excess of £10 from any person without disclosing the fact that he is an undischarged bankrupt; (b) that a banker must not conduct an account for a person whom he knows to be an undischarged bankrupt unless, having notified the trustee or the Board of Trade of the existence of the account, *either* (i) he receives the sanction of the Court or the trustee or the Board of Trade to the making of payments, *or* (ii) no action is taken by the trustee or the Board of Trade within *one month* of the notice.

On the other hand, s. 47 of the Bankruptcy Act, 1914, protects as against the trustee certain transactions by undischarged bankrupts provided the property concerned has been acquired by the bankrupt *after his adjudication*, and brings within the sphere of this protection payments and transfers by a banker of money, securities or negotiable instruments to a bankrupt customer, or on his instructions to a third party, provided the transactions are completed before the trustee intervenes. But if the property or money delivered has been acquired by the bankrupt *before his adjudication*, no protection is afforded, and the banker is accountable to the trustee for the value of such property or funds.

This protection does not release the banker from the duty of notifying the trustee in bankruptcy or the Board of Trade of the existence of an account in the name of the debtor *in every case* where he discovers that the customer is an undischarged bankrupt.

### Trustees

In the conduct of a trust account, the banker must consider not only his customer, but also the beneficiaries under the trust. But he is not liable for breach of trust so long as he cannot be held to be a party to the breach, *e.g.*, by being vested with notice of it.



What constitutes notice is a question of fact to be determined by the circumstances of each case.

The banker may well be affected with notice of the breach if he derives some personal benefit therefrom, *e.g.*, where his customer has an overdraft on his private account and, being pressed for a reduction, transfers funds from the trust account.

The banker would also be guilty of negligence within the meaning of s. 82 of the Bills of Exchange Act (see Chapter 16), if he were to credit a customer's private account with cheques payable to the customer in a fiduciary (trustee) capacity, or payable to a trust with which he is connected.

On opening a trust account in two or more names, a banker should insist that cheques shall be signed by all the parties unless the trust deed expressly provides that one or some of the trustees may sign on behalf of all.

**EFFECT OF THE DEATH OF A TRUSTEE.**—On the death of a trustee who is a party to an account, a banker, before permitting the surviving trustee or trustees to operate the account or deal with trust property in the bank's custody, should satisfy himself that the terms of the trust deed do not require the appointment of a new trustee. If they do, the account should be stopped until the banker is notified in writing of the appointment of the new trustee and is supplied with his signature and description.

On the death of a sole or last surviving trustee, a new trustee or new trustees may be appointed in accordance with the Trustee Act, 1925, but, pending such an appointment, the personal representatives of the deceased trustee may exercise any powers that he himself could have exercised.

**EFFECT OF A TRUSTEE'S BANKRUPTCY.**—The bankruptcy of a trustee does not affect the trust property, as such property belongs to the beneficiaries and cannot be claimed by the trustee's private creditors; nor does it necessarily affect his rights to carry on the trust, although it may be desirable to apply to the Court for the appointment of a new trustee in accordance with the powers given in the Trustee Act, 1925. A bankrupt *trustee in bankruptcy*, however, may not continue to act.

## Executors and Administrators

The accounts of executors (which for present purposes may be regarded as including the accounts of administrators) are merely trust accounts of a special kind, but differ in that executors may delegate their authority as between themselves and that the signature of one executor is sufficient to bind all, whereas such a delegation of authority can be made by trustees only in exceptional circumstances.

But executors may not delegate their authority to a third party except where they are employing a professional man, such as a solicitor, stockbroker or auctioneer.

Sometimes, before probate is obtained or letters of administration are granted, the personal representatives of a deceased person require an advance, *e.g.*, to pay death duties. In such circumstances, a banker should satisfy himself that the persons concerned have the right to deal with the affairs of the deceased, and should make the parties jointly *and severally* responsible for the overdraft by taking their signatures to a joint and several guarantee. If necessary, he should also require the deposit of collateral security.

Even with probate or letters of administration, personal representatives have no power to borrow so as to bind the *general* estate of the testator, but, unless they are expressly forbidden to do so by the will, they can give the lender a charge over *specific* assets belonging to the estate. In the absence of such a specific charge, a banker cannot retain any securities belonging to the deceased's estate in respect of advances granted to the personal representatives.

If the account of a deceased person is overdrawn at the time of his death, the banker is entitled to retain any securities (other than securities or valuables deposited for safe custody) until the advance is paid off by the personal representatives. If the value of the security held is not enough to repay the loan, the banker must claim for the balance as an ordinary creditor of the general estate.

A banker is not entitled to transfer from an executorship account an amount sufficient to discharge any outstanding liability of the deceased; he should get authority in the form of a cheque signed by all the executors.

### Trading Partnerships

Every ordinary partner in a *trading* partnership (*i.e.*, every partner other than a *limited* partner—see page 44) has implied power to bind the firm by opening an account in its name and by drawing, indorsing or accepting bills of exchange; but one partner's authority may be restricted by all the partners, in which case no person can thereafter rely on that partner's *implied* authority to act for his firm. Bankers do not ordinarily open accounts in the name of a firm, or pay cheques bearing the signature of one partner, without the written authority of all.

All partners should join in an authority to enable a third party to operate the firm's account, and the authority should set out clearly the limits of the third party's powers.

As a rule, the partnership mandate will embody the undertaking of the partners to hold themselves jointly *and severally* liable in

respect of any overdraft or loan granted to the firm, but some bankers insist also on all the partners signing a joint and several guarantee as well. Although any ordinary partner in a *trading* firm has implied power to pledge its credit, to borrow money, and to sell or pledge its property for the purposes of the partnership business, bankers usually get *all* the partners to sign any document charging property of the partnership as cover for a loan or overdraft granted to the firm.

All the partners should sign guarantees and legal mortgages *under seal*, for one partner has no implied power to bind his co-partners by giving a guarantee (unless it is the firm's business to give guarantees) or by executing a deed in the name of the firm.

### Non-trading Partnerships

A partner in a *non-trading* firm, such as a firm of doctors or solicitors, has no implied authority to bind the firm by bill of exchange or promissory note, or to borrow money on behalf of the firm, or to pledge its property as security for an advance. A partner who seeks in this way to bind a non-trading firm without having express authority to do so will be personally liable, but the other partners will not be bound.

In dealing with a non-trading partnership, a banker should require the signature and authority of *all* the partners in respect of all operations connected with the account, unless a mandate signed by all the partners is taken giving one of their number or a third party authority to operate on behalf of the firm.

### Dissolution of Partnership

A partnership may be dissolved by mutual agreement or by a change in its constitution caused by the death, retirement, or bankruptcy of a partner, and, in the last three cases, the banker must stop the firm's account if he wishes to preserve his rights against the estate of the partner who is dead, retired, or bankrupt. If the partnership is continued by the surviving partners, they should be required to furnish the bank with a fresh mandate, and to open a new account for all subsequent transactions.

When a partnership is dissolved, the credit balance on the firm's account vests in the remaining partners, but they are liable to the personal representatives of the deceased in the case of death, or to the trustee in the case of bankruptcy, or to the partner himself in the case of retirement, for that portion of the assets of the firm which belonged to the outgoing partner by reason of his interest in the partnership.

Retired partners, or the legal representatives of a deceased or bankrupt partner, have no power to bind the firm in any way. But any cheques drawn on the firm's account by a deceased partner

can be paid by the banker unless there are special circumstances that warrant their return, *e.g.*, where the account has been stopped by the banker to safeguard his rights against the deceased partner's estate, in which event cheques should be returned marked "Partner deceased"; or they can be paid, with the consent of the surviving partners, to the debit of a new account for which they are responsible. Cheques drawn by a bankrupt or retired partner may also be paid if they are dated before the bankruptcy or retirement, although it may be advisable in such cases to obtain confirmation from the other partners.

On the dissolution of a firm, the partners (or the remaining partners, if one is dead, bankrupt or has retired) have authority to bind the firm and continue its business so far as may be necessary for the winding up of the partnership affairs. For this purpose they may sell or pledge the partnership property, draw and indorse cheques, draw, indorse and accept bills, and perform any other acts necessary for the proper winding up of the firm's business.

If a partnership account is not stopped on the happening of one of the events mentioned, any payments to the credit of an overdrawn account after the happening of the event will, by reason of the operation of the Rule in Clayton's Case, have the effect of reducing *pro tanto* the liability of the members of the old firm, or the liability of a guarantor for the old firm.

A banker cannot hold liable the estate of a deceased or bankrupt partner in respect of debts or obligations created by the partnership after the date of death or bankruptcy, but a retiring partner may be held liable for obligations incurred after his retirement, unless notice of the retirement was received by the bank before the debts were incurred.

The insanity of a partner does not necessarily involve the dissolution of the firm, but, on application by another partner, the Court may decree a dissolution if the insane person is found lunatic by inquisition or shown to the satisfaction of the Court to be permanently of unsound mind. From a banker's point of view, it is desirable that such a dissolution should be effected, otherwise he may be involved in difficulties by reason of the issue of cheques or by other activities of the insane partner.

### Limited Partnerships

A limited partnership is one, formed and registered under the Limited Partnership Act, 1907, having one or more general partners fully liable for all obligations of the firm, and one or more *limited* partners whose liability is limited to the amount each has agreed to contribute when joining the firm. A limited partner may not take part in the management of the business, or he may render himself liable equally with the general partners. Bankers

should not act on instructions from a limited partner, nor grant advances to the firm in reliance on his private means.

The death or bankruptcy of a limited partner does not involve the dissolution of the firm, so that the firm's banking accounts need not be stopped in such an event.

## CHAPTER 6

### IMPERSONAL CUSTOMERS

THE powers of such customers as joint-stock companies, friendly societies, and municipal corporations are strictly controlled by the statute or charter under which they are constituted. Hence, before entering into business relations with any such body, a banker should make himself thoroughly acquainted with any Act of Parliament, general or private (*local* as it is sometimes called), charter or other document by which it is governed.

#### Joint-Stock Companies

As a rule, the first step in the opening of the banking account of a limited company is the passing by the board of directors of a resolution that the account of the company be opened at a certain bank, and that the bank be supplied with the required particulars regarding the company's constitution and powers.

This resolution is embodied in a mandate addressed to the banker and is forwarded to him with (a) the company's Certificate of Incorporation, for inspection and return; (b) copies of the company's Memorandum and Articles of Association for retention; (c) the company's Trading Certificate (or Certificate of Authority to Commence Business) for inspection and return; (d) a certified copy of the resolution of the directors authorizing the opening of the account, together with specimen signatures of the persons authorized to sign on the company's behalf; (e) a copy of the company's last balance-sheet (if any) certified by its auditor.

A public joint-stock company cannot commence business or borrow money until it has been authorized to do so by a trading certificate issued by the Registrar of Companies; any contract made by such a company before the issue of the certificate is provisional only, and is not binding on the company until the certificate is issued. Private companies do not require a trading certificate.

#### Company's Memorandum and Articles

The Memorandum and Articles of Association indicate the nature of the company's business, the extent of its powers and the rules by which it is to be administered.

The Articles are ancillary to the Memorandum, and from them can be ascertained the rights given to the directors to exercise the powers of the company as laid down in the Memorandum: regulations governing the execution of contracts and deeds, the drawing and endorsement of bills of exchange, promissory notes, and cheques, and the conduct of the banking account; what powers are given to the directors; whether the mandate signed on the company's behalf by its officials is within the provisions of the Memorandum and Articles, for, if any acts of the officials go outside the powers conferred on the company by its Memorandum, they will be *ultra vires* (i.e., beyond the powers of) the company, and not binding upon it. If the acts are within the Memorandum but outside the powers of the officers as laid down in the Articles, the acts will be *ultra vires* the officers, and the company *may or may not* be bound according to the circumstances.

### Borrowing Powers of Joint-Stock Companies

The Memorandum of a *non-trading* company must contain express powers if the company is to sell, borrow and pledge property, otherwise the company cannot even discount bills of exchange. On the other hand, a *trading* company has *implied* powers to borrow and to pledge its property to such an extent as is reasonably necessary for the carrying out of its legal objects, even if such powers are not specifically given in its Memorandum.

A banker should not lend to a company without obtaining a certified copy of the resolution of the directors authorizing the advance and the charging of security. He should satisfy himself that the borrowing is within the limits, if any, as to amount, purpose and method, and as to security, laid down in the Memorandum and Articles, from the standpoint both of the company and of its directors. If the directors borrow when the company has no power to borrow, the borrowing will be *ultra vires* the company and void, and any security given will be unavailable as against the company.

The remedy left to the lender in such circumstances is that of "subrogation" to the rights of the creditors or other persons who have been paid with the funds borrowed, i.e., he may "stand in the shoes" of those who have benefited in money by reason of his having granted the advance. But this right does not entitle him to any securities or priorities of any creditors so discharged.

Moreover, unless the lender knew the directors were exceeding their powers, he may sue them personally for breach of warranty of authority, or he may obtain an injunction restraining the company from parting with the money, if it can be identified and has not been so used in the company's business that it cannot be followed.

If, on the other hand, the borrowing is in excess of the powers of the directors only, as prescribed by the Articles, the company may ratify the borrowing, and so make itself liable to repay the advance. If it does not do so, the banker may or may not be able to hold the company liable, but the directors may be liable for breach of warranty of authority provided the banker was unaware that they were exceeding their powers.

### Borrowing by the Issue of Debentures

Companies frequently borrow money for the purpose of their business by the issue of *debentures*, which usually take the form of a deed under the company's seal, stamped with *ad valorem* duty, and containing a promise by the company to repay the money lent with interest thereon, subject to certain specified conditions. Debentures may be payable to *bearer*, in which case they are regarded as negotiable instruments transferable by delivery, or they may be *registered* debentures, *i.e.*, payable to a registered holder, in which case they are usually transferable by deed. As a rule, interest on the former is paid against the delivery to the company or its bankers of "*coupons*" detached from the debenture, while, in the case of registered debentures, interest is usually paid by warrant to the registered holder.

Usually, a debenture gives the lender as security for the loan a charge or mortgage over some specific part or all of the property of the company, in which case it is described as a "*mortgage debenture*", and must be registered with the Registrar of Companies. Sometimes, however, a debenture is merely a promise to repay money borrowed and does not give any charge over the company's property, in which case it is referred to as a "*naked debenture*".

Where debentures are secured by a charge over the company's property, it is a common thing for the charge to be created by a separate *trust deed*, which embodies the terms upon which the issue of debentures is made, and is referred to in the body of each debenture. The charge created may be either *specific* or *floating*, or a combination of both. A *specific* charge is usually given over the fixed assets of the company, *e.g.*, its land, buildings and machinery, and its effect is to debar the company from selling or disposing of such property during the existence of the charge.

### Floating Charges on a Company's Property

A **FLOATING CHARGE** is one given over a company's property, present and future, including assets of a constantly changing nature, such as stock-in-trade, book debts, etc. Such a charge permits the company to deal with the assets in the ordinary course of its business so long as it is a going concern, and so long as the charge does not become "*fixed*" or "*crystallized*". The charge is said

to become fixed when the money secured by the debenture becomes immediately repayable in accordance with the terms of the instrument, as, for example, when the company makes default in the payment of interest or when an order is made or a resolution passed for the winding-up of the company.

All charges—fixed or floating—over a company's property are void unless they are registered with the Registrar of Companies within twenty-one days of their creation.

### **Winding-up of a Registered Company**

The existence of a company is terminated by its winding-up or liquidation, during which its assets are realized and the proceeds applied in payment of its debts, the surplus, if any, being distributed among the shareholders.

As soon as a banker receives notice of the commencement of the voluntary or compulsory liquidation of a company-customer, he should at once stop the relative account, and hold any credit balance thereon at the disposal of the liquidator, who has power to operate the account. If the account is overdrawn, the banker must take the necessary steps to obtain repayment.

In regard to the payment of a company's cheques after the commencement of a *compulsory* winding-up, the banker's position is similar to his position on the bankruptcy of a private individual. A compulsory liquidation is deemed to commence at the date of the presentation of the petition. From that date the power of the directors to draw cheques on the company's account is determined, and, unless the Court otherwise orders, the banker cannot debit to the account cheques paid by him after the date of the petition, even though he has no notice of its presentation. Accordingly, a banker's only safeguard is to maintain a regular search of the *Gazette*, especially if he has any suspicion that the finances of the company are not as sound as they might be, and at once to stop the account of a company customer against whom a petition is presented—this despite the fact that many petitions are dismissed by the Court.

A *voluntary* liquidation is commenced by resolution of the company in general meeting, followed by a statutory advertisement in the *Gazette*, and a banker, therefore, is rarely without due notice of the commencement of such a winding-up. The liquidator can be permitted to deal with the balance on production of a certified copy of the winding-up resolution appointing him.

### **Non-trading Corporations**

*Non-trading* corporations, such as railway companies, electric lighting companies, and water companies, have no power to borrow



money or to pledge their property as security unless such powers are conferred (a) in the case of *statutory* companies, by the statute under which they are formed, or (b) in the case of *registered* companies, by their Memorandum of Association. Nor, in the absence of express powers, can non-trading companies draw or accept bills of exchange or make promissory notes, although presumably they can draw and indorse cheques on a banking account.

Accordingly, on opening an account for any such corporation, the banker should satisfy himself of its powers in relation to banking operations generally. If it has no power to borrow, and the banker grants an overdraft, or grants an overdraft in excess of any limit imposed by the Memorandum or governing statute, the loan will be *ultra vires* and may not be recoverable.

### Building and Friendly Societies

When opening an account for a building society or friendly society, a banker should take a mandate embodying a resolution of the governing body of the society appointing the bank as its bankers, and containing instructions as to the signing and indorsing of negotiable instruments, with specimen signatures of the officials authorized to sign and indorse. The banker should satisfy himself that the instructions given are in accordance with the society's registered Rules, which he should obtain and file for future reference.

The account should be opened in the full name and with the full address of the society, and the names of the signing officials should be appended. Arrangements should be made for the immediate notification of any change in these particulars.

Before making an advance to such a society, the banker should ascertain from the Rules and from the governing statute whether the society has power to borrow, whether there is any limit to such powers, precisely how the powers are to be exercised and how the loans are to be secured. Otherwise he will run the risk of being unable to recover money lent to the society in excess of the authorized limit.

### Trade Unions

The general principles governing the conduct of the account of a friendly society apply in the case of a trade union. The Rules of the union must be investigated to ascertain the powers of its officials and the authority, if any, given to its officers to borrow money on its behalf.

The account of a trade union must be opened in the name of

its properly appointed officers, all of whom should be required to sign cheques and other instruments. If an advance is granted, the personal security of the officers should be obtained in the form of a joint and several guarantee, although the officers have a limited power to borrow against a mortgage of property of the union.

### Accounts of Clubs, Committees, and Associations

Included under this heading are accounts opened in the names of associations of various kinds formed for charitable, literary, religious, political, or sports purposes.

Such accounts are to be distinguished from those opened in the names of private customers with an indication in the heading that the account relates to some club, association, or society, as, for example, an account headed "Thomas Robinson, *re* Northtown Charity Club". An account of this kind may be treated as a personal account, except that the bank will be deemed to have notice of its fiduciary character.

If an account is to be opened in the name of an association, society, etc., the banker should ask for a copy of the Rules of the association, society, etc., and should take a mandate embodying a resolution of the association, etc., or of its committee or council, appointing the bank as its bankers, and including instructions as to how cheques are to be signed, with specimen signatures of the persons authorized to operate. The mandate should be signed by the chairman of the meeting at which the resolution is passed, and by the secretary and treasurer.

Associations of this kind have no legal entity and cannot be sued in respect of liabilities incurred by their officials, while the officials or other persons who are deputed to sign cheques on the association's account cannot be held *individually* liable for any advance, provided they clearly indicate that they are acting on behalf of the association. Consequently, an overdraft on an account of this nature should be granted only against the guarantee of someone of sound financial standing, who is then, in effect, the principal debtor though nominally a surety.

Upon the death or retirement of any person signing cheques of a society or association, the account should be stopped, but the banker may pay cheques drawn before he received notice of the event in question. The account need not be stopped if the mandate authorizes signature on behalf of the society by any one of two or several persons, provided that any cheques paid by the banker subsequent to receipt of notice of the death or retirement or withdrawal do not bear the signature of the person concerned.

## Local Authorities

Local authorities are really trustees for the public, whose interests they are required to protect. The funds they control are trust funds, and the banker is presumed to know this. He must therefore exercise as great a degree of care as he would exercise in the case of any other form of trust account.

In the majority of cases, the account of a local authority is opened in the name of a treasurer, who may be the manager of the branch bank at which the account is kept, but in larger towns the treasurer is an officer of the authority. An account in the name of a treasurer is regarded as existing between the treasurer and the local authority, and not between the local authority and the bank, for a joint-stock bank is precluded from acting as treasurer. Accordingly, the heading of the ledger account and in the pass-book should be worded somewhat as follows: "Thomas Robinson, Esq., Treasurer to the Northtown Urban District Council", or "Thomas Robinson, Esq., Treasurer to the Mayor, Aldermen and Burgesses of the Borough of Southtown".

Separate accounts must be opened for each undertaking of a local authority, and the balances and operations thereon must be regarded as entirely distinct for all purposes. Thus, if an authority has a number of accounts headed "General Account", "Water Account", "Tramways Account", etc., they must be kept distinct both by the authority and by the bank, all cheques and credits being properly marked to indicate the account to which they refer. In no circumstances can a banker exercise any right of set-off in connection with these separate accounts.

When opening an account for a local authority, the banker should obtain a properly authenticated resolution of the authority appointing the treasurer, embodying instructions as to how cheques and other negotiable instruments are to be signed, and accompanied by specimen signatures of those authorized to sign and to act on its behalf. As a rule, the mandate will be given under the common seal of the authority.

It is sometimes arranged for the treasurer to be furnished periodically with a schedule of payments to be made by him, the schedule being authenticated by the signatures of certain members of the council or finance committee, and by the clerk, as required by the statute governing the operations of local authorities.

## SECURITIES FOR ADVANCES

It is a feature of banking in this country that the banks do not lend money in cases where *permanent* capital is required. Bank advances are essentially for short term, and it is the practice to make them repayable on demand and to review them at relatively frequent intervals. Liquidity is a traditional quality of advances in British banking.

Normally, a banker who is asked for a loan for long-period capital purposes will advise that the money be raised on mortgage or, in the case of a limited company, by the issue of additional capital or debentures.

If the borrower is a trader or business concern, a balance-sheet or a statement of affairs should be obtained in order to ascertain, particularly where no specific security is offered, what backing there is in the business for the borrowing, and whether the borrowing is justified and likely to prove advantageous to the business. Further, a banker should satisfy himself as to when, and the source from which, repayment may be expected.

A banker has a right of action against a borrowing customer in respect of the debt, but it is preferable, and usual, for the banker to safeguard his position by requiring the deposit of independent security. Such security is described as *personal* or *impersonal*; *direct* or *third party*; *primary* or *collateral*; according to the sense in which the matter is considered.

## Personal Security

The term "personal security" (in contradistinction to "impersonal security", *i.e.*, security that can be realized by sale or transfer) is applied to an undertaking by some third person to be responsible for the repayment of an advance, and may take the form of a guarantee under hand or under seal, or a bond under seal, or a promissory note. In all such cases, the remedy of the banker is a personal one, *i.e.*, if the undertaking is not fulfilled and the advance is not repaid, the banker must take action to enforce his rights against the person who signed the undertaking.

## Collateral Security

In general, the term "collateral security" applies to all types of security that run *side by side* with the banker's personal right of action against a debtor customer in respect of an advance; *i.e.*, it applies to share certificates, bearer bonds, title deeds, life policies, etc., deposited by the customer as cover for an advance;

and also to a guarantee or other security signed or deposited by a *third party* as security for the customer's overdraft.

In another sense, the term "collateral security" is applied to any of two or more securities that cover *the same debt*, as where the account of one customer is secured by two guarantees, or by a guarantee and documents of title.

If a banker holds collateral security given or deposited by a *third party*, then, in all his dealings with the customer, he must, unless exempt by the terms of his agreement with the third party, respect the relationship of principal and surety existing between the customer and the third party. In the absence of an agreement to the contrary, the surety will be discharged if the banker without the surety's knowledge or consent varies the arrangement with the principal debtor, *e.g.*, by giving him time for the repayment of the advance or by lengthening the period for which it is granted.

Collateral security (apart from guarantees and bonds) may become available to a banker in one of four main ways: (a) Mortgage; (b) Pledge; (c) Hypothecation; (d) Lien. The first three of these are evidenced by an instrument containing the charge, the reason for it, the amount of the advance and other relevant particulars.

## Guarantees

A GUARANTEE is a contract whereby one person, the *guarantor* or *surety*, undertakes to be answerable for the payment of a debt or the performance of some act by another person, the *principal debtor*. The contract of guarantee is therefore a *secondary* one, the guarantor being liable only if the principal debtor defaults. A guarantor who fulfils his obligation and pays the creditor may sue the principal debtor for repayment.

A contract of guarantee is unenforceable unless it is evidenced by some note or memorandum *in writing*, which must contain at least the names of the parties, the signature of the surety, and the essential terms of the contract. The consideration need not be specified, but in a banker's guarantee it is usually stated to be the making or continuance by the banker of advances or the giving of credit or forbearance to sue for an existing debt.

A banker's guarantee is comprehensive in form to safeguard the banker against all contingencies, and is designed to cover every kind of credit transaction with the customer. It usually provides that the contract shall not be prejudiced if other securities are taken from the debtor, or if arrangements are made with the debtor regarding the exchange or release of securities, or for the giving of time in which to pay. In the absence of such express agreement, the guarantor would be freed from liability (*i.e.*, discharged)

if the banker did any of these things, as they *may* prejudice the guarantor's position.

A bank guarantee usually ensures that, in the event of the customer becoming bankrupt, the bank shall be entitled to prove in the bankruptcy for the full amount of the debt, without first deducting the amount the bank is to receive under the guarantee. In this respect, a guarantee affords better cover than security deposited by the customer himself, for, in the latter case, the security has to be valued and deducted from the amount for which the banker proves in the bankruptcy, or it must be surrendered to the trustee in bankruptcy.

Finally, the guarantor undertakes to pay on demand the amount due to the bank.

Embodying as it does a *personal* responsibility only, a guarantee depends for its value to a banker on the substance and integrity of the guarantor, and on his continued ability to meet the obligation. A banker should, therefore, ascertain at the outset that the proposed guarantor can be relied upon for the amount he undertakes to pay, and confirm the position from time to time.

Unless the manager is satisfied from personal knowledge or from another banker's confidential opinion that a proposed guarantor is undoubted for the liability, the guarantor should be required to deposit security in support of the guarantee.

Guarantees are often entered into, thoughtlessly, or, at least, in the belief that the transaction is only a formality. It is, therefore, important that a prospective guarantor should understand the exact nature of the contract; and, in cases where undue influence is possible, it is wise to ensure that the surety signs of his or her own free will in the presence of an independent witness, preferably a solicitor. Thus, a woman who gives a guarantee on behalf of her husband should be advised on the matter by a solicitor who does not act for the husband.

Although a contract of guarantee does not call for the fullest disclosure, it is voidable by the surety if the creditor either deliberately misleads him or even innocently misrepresents the true position. Enquiries of the banker by a prospective surety must be answered fairly. But the banker need not disclose the debtor's affairs beyond giving information directly demanded by the questions put to him by the surety as a preliminary to deciding whether or not to enter into the obligation.

### Continuing Guarantees

Banker's guarantees are invariably *continuing* guarantees, *i.e.*, the guarantor undertakes to be liable for the balance at any time owing on the debtor's account during the continuance of the guarantee, up to any limit that may be specified. This form is used

whether the advance is taken as a fluctuating overdraft or on loan account.

Some bankers' guarantees provide that the surety's liability shall continue until the *expiration* of three calendar months from the time when notice to terminate the guarantee is given by the surety or his *personal representatives*. The effect of this is that the guarantor, or his estate in the event of his death, is liable to the banker for the payment of any *outstanding* cheques and for any liabilities of the principal debtor to the bank contracted by him before notice was given but accruing *during the period of notice*.

### Specific Guarantees

A *specific* or *non-continuing* guarantee is one in which the surety undertakes to be liable only in respect of a specific transaction or a fixed advance. Such a guarantee cannot be revoked by the surety until the loan is repaid, but is not ordinarily taken as a banking security.

### Mortgage

A MORTGAGE (other than a mortgage of land) is a conveyance of the legal ownership of the thing mortgaged to the lender, the possession of that thing in some cases remaining with the borrower and in other cases passing to the lender.

A LEGAL MORTGAGE transfers the ownership (though not necessarily the possession) of the property charged to the mortgagee, and gives him a right to sell the property upon default by the mortgagor in paying the principal or interest. The mortgagor is left with his *equity of redemption*, i.e., the right to claim the transfer back of the property on discharging the mortgage.

An EQUITABLE MORTGAGE, which may be created by deposit of title deeds with or without a memorandum, or even by a memorandum of charge without deposit of the deeds, gives the mortgagee only an equitable interest in the property, which, except with the consent of the mortgagor, can be realized only if the mortgagee obtains a power of sale or an order for foreclosure from the Court.

### Pledge

PLEDGE means the actual or constructive delivery of goods or securities by a debtor to his creditor to hold as a security for the debt. It is an *express* or *implied* term of a contract of pledge that the ownership of the security remains vested in the pledgor (he who deposits them). The rights of the pledgee (who is *in possession* of the security) permit him to retain the security until payment of the debt and, in case of default, to realize it.

A pledge may be evidenced by a memorandum of deposit, which states the security, the purpose of the deposit, the amount

and limit of the advance (*i.e.*, the consideration to be given), and that the security shall be a *continuing one*.

In the case of *fully negotiable securities*, a memorandum of deposit is not strictly necessary, since a lender who acts in good faith and without notice of any defect of title on the part of the depositor is established as a pledgee by mere deposit of the securities (so long as there is no agreement inconsistent with their being held against an advance), and has an absolute title against all the world to hold them until his debt is discharged, and to realize them if he does not obtain repayment. This is so even if the depositor is not the true owner, as mere delivery without notice of defect of title is enough to effect a transfer of the property in fully negotiable securities.

The pledge of documents of title to goods is, in effect, a pledge of the goods themselves, for delivery of the documents is recognized in law as a constructive delivery of the goods.

## Hypothecation

HYPOTHECATION resembles pledge in many ways, but goods hypothecated do not pass into the possession of the creditor. The term is strictly used to describe the arrangement whereby one person charges goods to another without delivering either the goods themselves or the documents of title thereto. The instrument creating the charge is called a *Letter of Hypothecation*. (See p. 64.)

## Lien

LIEN is the right of one person to *retain* property in his hands belonging to another until his claims against the owner of the property are satisfied. Thus a garage proprietor has a lien on a car in his possession in respect of money due to him by the owner of the car.

Lien differs from a charge in that it cannot be the subject of a *formal* or *express* contract; it arises by operation of law and not from deliberate human intention.

Lien may be either *particular* or *general*. A particular lien confers a right to retain goods in connection with which the *particular* debt arose, whereas a general lien confers a right to retain goods, not only in respect of the debt incurred in connection with them, but also in respect of the *general* balance due by the owner of the goods to the person holding them.

**BANKER'S LIEN.**—In *Brandao v. Barnett*, 1846, it was stated: "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien". It has always been understood that a banker's lien is an *implied pledge*, giving him a right, in case of



default, not only to retain but also, after due notice to the customer, to realize securities of the customer and to apply the proceeds in satisfaction of his debt.

Banker's lien arises mainly over negotiable securities, e.g., cheques, bills, notes, bearer bonds and share warrants to bearer. Any such securities that come into the banker's hands in the ordinary course of his business as a banker are subject to his lien provided they are not deposited for a special purpose only (e.g., safe custody), and that there is no agreement between the banker and his customer that can be regarded as negating, or being inconsistent with, the banker's right of lien. Thus, lien would attach to bills of exchange handed to a banker for collection, but probably not to bills lodged for the express purpose of being presented for acceptance. Similarly, a banker has no lien on a scrip certificate left by a customer expressly for the purpose of being exchanged for a bond.

✓ Banker's lien does not apply to securities specifically charged as cover for an advance because the superior right given by the charge overrides the inferior right of lien.

No lien can arise in respect of property that comes into the banker's hands by mistake or to cover a specific advance that is not granted.

## CHAPTER 8

### MAIN TYPES OF COLLATERAL SECURITY

In estimating the worth of collateral security, the banker should consider at least the following seven important points : (a) *simplicity of title* ; the security should be such that title thereto can be perfected without difficulty ; (b) *ease of transfer* ; the banker should, if necessary, be able to obtain a transfer of the title to him or to his nominees without trouble or expense ; (c) *reasonable steadiness of value* ; a security subject to wide variations in price is not satisfactory, unless there is a large margin over the sum advanced ; (d) *readiness of sale* ; this is of importance if the banker is to avoid being left with property on his hands which he cannot convert into cash except with loss of time, trouble and expense ; (e) *sufficient margin for loss or depreciation* ; unless the value of the security is fairly stable, the banker should require an ample margin ; (f) *absence of liability* ; as far as possible the banker will avoid taking as security property which might involve him in liability to third parties, e.g., shares whereon calls may be made ; (g) *safety as to title* ; a security should be free from defect of title, i.e., the depositor or chargor should have a good title or power to give a good title.

## STOCK EXCHANGE SECURITIES

The most common form of security taken by a banker is what are collectively described as *stock exchange securities*, i.e., stock and share certificates, debentures, bearer bonds and scrip certificates. Stock exchange securities have generally the merits of being quickly and easily realizable, while their market value is easily determinable.

Some stock exchange securities are naturally more stable in value than others, but what a banker accepts as security is a matter essentially individual, dependent on the circumstances of the particular case. What he would take in one case would not be suitable in another. He has to take into account that a liability attaches to non-fully paid-up shares; that other securities, such as mining, oil and rubber shares, are, at times, liable to wide fluctuations in price; that shares in private companies may not be transferable or easily realizable.

Stock exchange securities are broadly divisible into two classes :  
(a) *negotiable* and (b) *non-negotiable*.

### Fully Negotiable Securities

Negotiable securities, such as bearer bonds, are negotiable by delivery and, therefore, are easily transferred. If there is a free market in the security, it is thus easily realizable. They are charged under a memorandum of deposit to avoid any question as to the purpose for which they were deposited. But no instrument of transfer is necessary.

Certain bearer bonds may be registered in the name of the holder, in which case an instrument of transfer is required on transfer, as for other non-negotiable securities (see below).

### Non-negotiable Securities

Non-negotiable stock exchange securities are mainly *registered stocks*, the title to which is represented by an entry in the books of the registrar, principal or agent by whom the stock is issued, and is, in addition, evidenced by a certificate of title. Transfer of registered stock is effected by an instrument of transfer.

There are also a few *inscribed stocks*, the title to which is evidenced only by the entry or inscription in the books of the issuing body. The stock receipt issued to the holder is not a document of title, and transfer of inscribed stock can be effected only by personal attendance of the holder or his attorney at the office of the issuing body.

### Security over Registered Stocks and Shares

The banker's security over registered stocks and shares takes form of either (a) a *legal mortgage*, or (b) an *equitable charge*.

**LEGAL MORTGAGE.**—Title to registered stock or shares is transferred by an instrument of transfer and is effective as soon as the name of the new beneficiary is entered on the register of the issuing body. The instrument of transfer may be either under hand or under seal, as required by the Articles of Association of the company, and, when completed, is forwarded with the relative share certificate to the registrar or secretary of the company.

In getting himself registered as the holder of shares taken as security, a banker assumes certain liabilities. If the shares are partly-paid, he renders himself liable for the payment of any future calls that are made, and this liability exists, in the event of the liquidation of the company, for one year after the bank has ceased to hold the shares, if the person to whom they have been subsequently transferred is unable to meet the liability for the uncalled capital.

**EQUITABLE CHARGES OVER STOCKS AND SHARES.**—In the majority of cases, a banker's security over registered stock or shares is equally effective if he does not go to the trouble and expense of obtaining the full title, but takes an *equitable* charge by deposit of the certificate with a memorandum of deposit and a *blank transfer*.

A blank transfer is one that is incomplete in certain essentials. It contains particulars of the shares or stock, but not the name of a transferee or the date, and is signed by the transferor. A blank transfer is useless if the Articles of the company require that transfer shall be by *deed*, for a deed cannot be completed in any material particular after execution. But if transfer may be *under hand* (as is usually the case), the delivery of a blank transfer is an authority to the transferee to fill in the blanks.

The mere deposit of a certificate with or without a memorandum gives the banker a valid charge but gives him no means of realizing the security, whereas he can complete and register a blank transfer under hand whenever he wishes to do so.

## LIFE POLICIES

Life policies of first-class companies are a good banking security in this country and their value usually increases with time. Bankers lend up to about 90 per cent. of the present value, *i.e.*, the surrender value.

The value of a life policy as security depends on its being free from restrictions (*e.g.*, on flying or foreign travel), and, in some degree, on its being free of any trust. Moreover, the validity of a contract of insurance is dependent on the disclosure, in the proposal form, of all material information and on its accuracy. Hence, it is

important that there should be no doubt on these points. As the premium is based partially on the age of the assured, the accuracy of the statement in this respect is of importance, so a lender against a policy usually requires that the age be "admitted" by the company on production of proof of age.

Security over a life policy may be taken either by *legal mortgage* (*i.e.*, *assignment*) or by *equitable mortgage*.

A LEGAL ASSIGNMENT conveys the policy to the bank by way of mortgage, subject to the assured's *equity of redemption*; it gives the bank the right to surrender or otherwise to dispose of the policy without the assignor's consent in satisfaction of any claims against him, but the assignor has the right to have the policy re-assigned on payment of the moneys due. Notice of the assignment is given to the assurance company and must be acknowledged, usually on payment of a small fee. The bank will ask for particulars of any prior charge or charges on the policy. If there are no such charges, the bank's charge will take precedence over any subsequent charges that may be created. If there is any prior legal charge, that charge and any discharge must be produced before a claim under the policy will be admitted, as a prior legal charge forms part of the chain and documents of title. Bank forms of legal assignment give the bank the right to pay the premiums as they fall due, on default by the borrower, to the debit of the latter's account.

AN EQUITABLE CHARGE or mortgage is taken by mere deposit of the policy with or without a memorandum. This has the advantages of cheapness and simplicity. The charge contains an undertaking by the assured to assign the policy if required to do so; and, as an equitable charge does not form part of the documents of title to the policy, the transaction is closed when the advance is repaid by the cancellation of the memorandum and the return of the policy to the assured. The disadvantage of this method is that, if the lender wishes to realize the policy and the borrower refuses to give a legal assignment, there is no other course than to apply to the Court.

## LAND AS SECURITY

Title-deeds to land and buildings are frequently taken by banks as security. The bank's underlying security consists of the actual land and/or buildings to which the title deeds relate, so that, apart from ensuring the validity, completeness and correctness of the deeds, it is necessary also to ensure the proper valuation and protection of the property.

As bankers in this country are essentially short-term lenders, a customer who requires a "dead" or semi-permanent loan against title-deeds will usually be advised to raise a mortgage through

either a solicitor or a building society. Nevertheless, bank advances against the security of land and houses or shop property are quite common, particularly where the accommodation is of a temporary or semi-permanent nature and the customer undertakes regular reduction of the overdraft.

### Mortgages as Cover for Advances

In accepting land as cover for an advance, several matters have to be considered by a banker with a view to protecting himself against contingencies that may jeopardize the value and validity of his security. First, he must ensure that he has an adequate margin. Secondly, the deeds must be valid, complete and in order, and the document evidencing the bank's charge must cover all contingencies. Thirdly, if advances have already been made by other lenders on the security of the property, the banker must appreciate that the earlier lenders will probably have first claim against the property, and, unless he can in some way obtain priority as against such lenders, he must ensure that any advance made by him is fully covered after allowing for the earlier advances.

### PRODUCE AND GOODS AS SECURITY

Successful lending against the security of goods calls for a fair degree of specialized knowledge, for, in addition to ensuring the validity and completeness of the documents themselves, and of dealing so far as is possible only with customers of known integrity, the lender must give consideration to the quality, value and freedom from deterioration of the goods.

The question of the *quality* of the goods is of importance in case the banker should be called upon to realize them, while the *risk of deterioration* must be carefully considered where the goods have to be sent great distances, or where they have to be stored for a period before realization. Perishable goods or goods subject to vagaries of demand or of fashion are not suitable as banking securities.

In addition, there is considerable risk of fraud in connection with the taking of goods as security, but the banker's position in these respects can be reasonably safeguarded if produce and goods are accepted as security only from customers of known repute, and if a competent independent valuation and periodical revaluation are insisted upon.

Finally, the banker must ensure that the property in the goods is properly conveyed to him by the documents deposited by the customer.

## DOCUMENTS OF TITLE TO GOODS

A banker accepting documents of title to goods as security will have regard to three important points: (a) the validity and completeness of the documents; (b) the nature, quality and value of the goods; and (c) possible claims over the goods of any persons other than his customer (*e.g.*, claims of an unpaid seller, or of a shipping company for freight).

In examining the documents the banker will ascertain that they purport to be complete and in order, and that they are properly stamped, where stamping is necessary. Care will be taken to distinguish between documents which in themselves *give a title* to the goods specified (*e.g.*, bills of lading and dock warrants), and documents such as warehouse-keepers' receipts and certificates, which are merely *acknowledgments of the deposit* of goods.

## Bills of Lading

A BILL OF LADING is a document signed by the master of a ship, acknowledging the receipt of certain specified goods, and embodying an undertaking on behalf of the shipowners to deliver the goods to "order", or to a named person "or his assigns", upon payment of the freight stipulated for.

A bill of lading is not a negotiable instrument, and, if it is drawn in favour of a named person without the addition of words such as "*or his assigns*", it is not even transferable. If, however, a bill of lading is drawn "to order", the full property in the goods concerned may be transferred simply by delivery of the bill after indorsement by the shipper. But such a transfer is "subject to equities"; *i.e.*, the transferee, even if he takes the instrument for value and in good faith, cannot acquire, or pass, a better title to the bill of lading or the goods than was possessed by his immediate transferor.

Bills of lading are usually drawn in *sets* of three or four parts, excluding any unsigned copies. The object is to enable the different parts to be sent to the consignee or his agent (frequently a banker) by different mails, and so reduce to a minimum the risk of loss or delay in transit.

As a general rule, an unsigned copy of a bill of lading is retained by the consignor as evidence of shipment, for use in the event of his having to claim on the insurers under the marine insurance policy covering the goods. A second copy will be kept by the master of the ship, to assist him in the identification of the goods.

## Bills of Lading as Security

Wherever possible, bills of lading accepted as security should be drawn "to order or assigns", so that they may be transferred by indorsement to the banker. They should be examined to

ascertain whether they contain clauses that may necessitate the payment of heavy charges to the shipowner, or otherwise operate to the detriment of the lender. Since a bill of lading affords no guarantee of the quality or value of the goods, the lender should insist on the deposit of an invoice showing the value and description of the goods. Further, the bill of lading should be accompanied by the relative marine insurance policy or certificate of insurance, whereon the description of the goods should agree with that given in the bill of lading. It should also be ascertained whether the bill of lading is *clean*, i.e., whether it acknowledges that the goods have been shipped "in good order and condition", or whether the shippers qualify their acknowledgment of the shipment by stating that the goods or the packages were in some way defective at the time of their receipt on board, in which event the bill of lading is said to be *clauséd*, or *foul* or *dirty*.

A banker advancing against the security of bills of lading issued in sets should arrange for the deposit with him of as many parts of the set as possible, so as to ensure that the goods cannot be claimed by any person to whom one of the parts has been fraudulently transferred.

### Dock and Warehouse Warrants

DOCK AND WAREHOUSE WARRANTS are documents issued by dock companies, warehouse-keepers, or wharfingers, in favour of persons depositing goods, and state that the goods described therein are deliverable to the person named in the warrant, or to his assigns by indorsement.

Although these warrants are transferable by indorsement and delivery, or by mere delivery if indorsed in blank, they are not negotiable instruments, so that any transferee will be affected by any defects in the title of his transferor.

A dock company or warehouse-keeper cannot be compelled to hold goods on behalf of any person other than the original depositor. Hence, a banker who takes such a document as security should at once give notice of his claim to the holders of the goods, so that a new warrant may be issued in his name, and he should also have the goods insured against fire and theft at the borrowing customer's expense.

### Warehouse-keepers' Receipts and Certificates

These are documents issued by warehouse-keepers, stating that the goods specified therein were deposited on a particular date by a person named, and that they are held at his disposal. Such documents, usually stated to be "not transferable", are merely receipts or acknowledgments for the relative goods. They are not documents of title, for the owner may obtain possession

of the goods without surrender of the certificate or receipt, by signing and forwarding to the warehouse-keeper a **DELIVERY ORDER**. This is a document addressed by the owner of the goods to the warehouse-keeper instructing him to deliver all or some of the goods to a specified person or to his assigns. Although such a document is not strictly a document of title, it is necessary to enable a third party to obtain goods in respect of which a warehouse-keeper's receipt has been issued.

A **WAREHOUSE-KEEPER'S RECEIPT** or **WAREHOUSE-KEEPER'S CERTIFICATE** taken as security should be accompanied by a delivery order made out in favour of the banker, so that he can obtain possession of the goods and have them stored in his own name. If the banker does not wish to register himself as owner of the goods, he may lodge a "*stop order*" with the warehouse-keeper holding the goods, in order to prevent unauthorized dealing with the articles by the customer or third parties.

### Letter of Hypothecation

A **LETTER OF HYPOTHECATION** is a document of charge by which a customer pledges documents of title with a banker as security. It authorizes the banker to deal with the goods in any way necessary, to insure and store them in his own name at the customer's expense, to pay freight thereon to the customer's debit, to sell them if he deems fit, and to apply the proceeds in repayment of any advance or payment made by him on behalf of the pledgor. Should the amount so realized be insufficient to satisfy the banker's claims, he still has recourse to the signatory to the letter of hypothecation for the balance due.

The object of such an authority is to ensure that the banker may be adequately covered in the event of the dishonour of the bills drawn against the goods, or in the event of the failure of the customer to repay the sum advanced.

### Trust Receipts

Customers who have obtained advances from a banker on the security of goods are frequently unable to repay the amount borrowed until they have realized the goods and received the proceeds. As the documents of title must be produced before the goods can be obtained from the shipping company, dock company or warehouse-keeper, bankers sometimes arrange to release the documents to the customer against his signature to an instrument known as a *Trust Receipt*.

This embodies an undertaking by the customer to hold the goods and any proceeds received in respect thereof as a trustee for the banker, in whose name the goods are to be insured and, if necessary, warehoused.



## CHAPTER 9

### THE BANKER AS BAILEE AND AS AGENT

PROPERTY left with a bank for safe custody may be deposited in a locked box, the key of which is kept by the depositor, or in a sealed envelope or parcel. In the majority of such cases, the banker is given no detailed information regarding the contents and has no responsibility for them, apart from the box, envelope or parcel. Stock exchange securities are usually left uncovered, particularly where, as in the case of bearer bonds, the banker is required to detach the coupons and to present them for payment.

A form of receipt is issued in respect of articles lodged for safe custody, and this must usually be returned discharged by the customer before the articles can be withdrawn. The bank will return the articles only to the depositor or to the depositor's known agent, who must produce a signed authority from the depositor and satisfactory evidence of identification.

Articles deposited in the names of two or more persons should be delivered only in strict accordance with instructions taken from all parties at the time of deposit. In the case of corporate bodies and partnerships, care must be taken to see that the parties whose signatures are affixed to a request for withdrawal are authorized for that purpose.

In the case of trustees, the deposit should be in the names of *all*, and the signatures of all are necessary for withdrawal, as trustees may not ordinarily delegate their authority even to co-trustees.

#### Death or Bankruptcy of the Depositor

On the death of the person in whose name articles are left with a banker for safe custody, dealings should be permitted by the personal representatives only on production of probate or letters of administration. But a will contained in a box held for safe custody may be handed over against the signatures of all the executors mentioned therein, or perhaps to the solicitors for the deceased.

On the bankruptcy of a person who has deposited articles with a banker for safe custody, the permission of the Official Receiver or of the trustee in bankruptcy is necessary to the release of any articles deposited.

#### Insanity of Depositor

If a customer who has deposited securities for safe custody becomes insane, the securities must be given up only in accordance with a lodgment order issued by the Master in Lunacy.

## The Banker's Obligations as Bailee

In taking charge of a customer's valuables for safe custody, the banker acts as a *bailee*, i.e., a person to whom goods are delivered in trust, to be held until reclaimed by the depositor, who is described as the *bailor*. No property in the goods thus deposited passes to the bailee; his capacity is merely that of a warehouseman or custodian of the goods for the person depositing them, and his liability for loss or theft of the articles depends upon whether he renders the service free of charge, or whether he is recompensed for his trouble; i.e., whether he is a *gratuitous bailee* or a *bailee for reward*.

Whereas a gratuitous bailee is bound to use only the best means and facilities at his disposal, a paid bailee is bound to provide himself with the best safeguards known to practical science.

Unfortunately, there is no agreement among the authorities as to whether the banker is a gratuitous bailee or a bailee for reward. Some maintain that the banker is properly regarded as a *gratuitous* bailee because he makes no special charge for his services, and because it is not part of his contract to take charge of his customers' valuables. Other authorities contend that a banker is a bailee for *reward* because he makes a profit by keeping a customer's account, and because one of the considerations by virtue of which customers open or continue their accounts is that the banker will, in accordance with long-established practice, accept their valuables for safe custody. It is argued, too, that this service is one which bankers do not usually place at the disposal of persons who are not customers, and that any banker who did so would make a special charge for the service. On the other hand, a customer cannot *compel* a banker to take charge of his valuables.

Even if a banker is to be regarded as a gratuitous bailee, he would be liable if he failed to take all precautions that his experience had shown to be usual and necessary. In other words, a banker who acts as gratuitous bailee must exercise as much care as would be expected of a bailee for reward.

The banker does not *insure* the safety of goods thus entrusted to him, so, if the goods are lost in spite of the fact that he has exercised every reasonable care, he will incur no liability to the party depositing.

A banker is liable for the loss, destruction or damage of articles entrusted to him for safe keeping which he deposits elsewhere than on his own premises, quite apart from any question of negligence. In such circumstances, his liability arises from breach of one of the conditions of the contract of deposit that he will safeguard the goods on his own premises.

A bailee of goods has no better title thereto than the bailor, so, if the latter has obtained goods or securities from another person

by fraud, the true owner can sue the bailee for their return even though the bailor's authority for withdrawal is not obtained.

### Return of Articles left for Safe Custody

A banker who takes goods or securities for safe custody must return the articles upon demand to the depositing customer, or his duly authorized agent, *but to no other*. If, through the banker's negligence, the articles are stolen or lost, or if he delivers them to a third person without the authority of his customer, or to a person who presents a forged or unauthorized authority, he will be liable to make good their value.

For these reasons, a banker should satisfy himself of the genuineness of the signature to an instruction for delivery of articles left for safe custody, and as to the authority of the person who presents the order for delivery. If there is any doubt, the banker should obtain the customer's confirmation.

The articles returned must accord in description with the articles deposited. If uncovered bearer bonds are left with the banker, those same bonds must be returned. But a banker is liable to return a locked box, or a sealed envelope or sealed parcel, only in the condition in which it was left with him, and he is not concerned with the contents.

### Valuables for Safe Custody and Third Parties

If a customer gives an authority to a third party to obtain access to a box or parcel deposited for safe custody, the banker should see that the terms of the authority are strictly complied with. Thus, if the customer merely authorizes the third party to *inspect* the documents or contents, the banker should ensure that the contents are examined only in his presence and should see that nothing is removed and that nothing is altered or damaged. If the authority permits the third party to remove a particular article from a box or parcel, the banker should see that only the specified article is taken away. It may be advisable for the bank's solicitor to attend.

### Banker's Lien and Articles for Safe Custody

As articles for safe custody are left with the banker for the specific purpose of safe keeping, they are not ordinarily subject to the banker's lien (see p. 56); *i.e.*, the banker has usually no right to retain them or to realize them in respect of a debt due by the customer to the bank.

But there may be circumstances that give the banker control of the articles in the ordinary course of business, as where he is instructed to cut off and collect coupons from bonds held by him for safe custody, in which case he may have a right of lien over both the bonds and the coupons.

## Collection of Drawn Bonds and Coupons in Safe Custody

In the absence of an express or implied agreement with the customer, there is no obligation on the banker's part to present for payment coupons or bonds left with him for safe custody, although in practice bankers almost invariably undertake this service in respect of all coupons and bonds of their customer to which they have access.

A banker who has once accepted the responsibility to present coupons or bonds for payment may be liable to the customer if any loss ensues by reason of his failure to present them for payment at the correct time and place. If the coupons or bonds are payable at times announced by advertisement, the banker must ascertain the dates upon which payment will be made (*e.g.*, by searching the *Bondholders' Register*), and must present the instruments on the date and at the place specified.

A banker incurs no liability in respect of the collection of coupons and bonds to which he has no access, *e.g.*, where they are deposited in a sealed envelope, or in a locked box of which the customer keeps the key.

## Stock Exchange Business

If a banker undertakes the purchase and sale of stock exchange securities on behalf of his customer, he becomes the *special agent* of his customer, and, unless he acts strictly in accordance with the customer's instructions and follows exactly the course of business that is usual in these operations, he may be held liable for any loss that the customer sustains by reason of his actions or disregard of instructions. The banker must, therefore, exercise care in buying or selling, act promptly, see that the brokers do not exceed the limits (if any) given by the customer, use due diligence in obtaining the transfers and in having them properly completed, ensure that the securities bought or sold (and no others) are actually received by him or sent to the brokers and see that the correct amount is paid or received by his customer in respect of the transaction.

## Advising Customers on their Investments

Although banks receive commission for carrying out stock exchange transactions on behalf of customers, the giving of advice concerning investments is not to be regarded as a part of a bank's duty to its customers, or as part of ordinary banking business, and, if such advice is given, a customer who suffers loss may *try* to hold the bank or its manager or other official liable for either *innocent* or *fraudulent* misrepresentation.

If a charge of *fraudulent* misrepresentation is made, the bank itself, by virtue of Lord Tenterden's Act, 1828, cannot be held liable unless the misrepresentation was made under its seal. But a bank manager, or other agent of the bank, who signs a document embodying a fraudulent misrepresentation may be held to be *personally* liable to the customer.

An action on the ground of *innocent* misrepresentation could not succeed unless it were shown (a) that there was a duty on the part of the bank to give the opinion in question; *and* (b) that the opinion was given under the bank's seal or over the signature of a duly authorized official; *and* (c) that, in giving the opinion, the bank or its official was guilty of negligence amounting to a breach of duty.

The safest course for a bank official who is asked for advice concerning investments is to refer the matter to the bank's experienced brokers, and to pass on their advice to the customer without comment.

# PART III

## BANKING INSTRUMENTS

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### CHAPTER 10

#### BILLS OF EXCHANGE

*Note:—In this and subsequent Chapters the Bills of Exchange Act, 1882, is referred to as "the Act", and any Section references (e.g., s. 12) are to that Act.*

THE bill of exchange is a most important type of negotiable instrument. Its great utility springs from the fact that it may pass through several hands for value before it is finally discharged, and so forms a convenient and safe means of making commercial payments and of transmitting funds from place to place. The bill of exchange is also a most important instrument of credit, whose functions are recognized in all places where men trade. It enables credit to be given and taken, it permits payment to be deferred and capital to be rapidly turned over in business operations. Moreover, as a bill is easily convertible into cash by sale or discount, and automatically turns into cash at maturity, it is an admirable form of short-term investment for bankers and others.

The working of a bill of exchange in its simplest form is as follows: Jones of London sends goods to Brown in Australia and obtains payment by drawing a bill on Brown for the value of the goods, payable in three months' time. Jones can at once obtain cash for the bill if he wishes by discounting it, or by negotiating it for value to someone else, while the period of three months that has to run before the bill matures gives Brown time to sell the goods and obtain funds to meet the bill when it is presented for payment.

Transactions involving bills of exchange are of every-day occurrence in banking, so every banker should be thoroughly acquainted with the law applicable to bills of exchange as laid down in the Bills of Exchange Act, 1882, and as interpreted by the Courts.

#### Terms Used in the Act

The provisions of the Act require an understanding of certain terms explained in s. 2:—

(2) In this Act, unless the context otherwise requires,—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

- "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking.
- "Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.
- "Bearer" means the person in possession of a bill or note which is payable to bearer.
- "Bill" means bill of exchange, and "note" means promissory note.
- "Delivery" means transfer of possession, actual or constructive, from one person to another.
- "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.
- "Indorsement" means an indorsement completed by delivery.
- "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.
- "Person" includes a body of persons whether incorporated or not.
- "Value" means valuable consideration.
- "Written" includes printed, and "writing" includes print.

## Negotiability

The bill of exchange owes its mercantile importance to its characteristic of *negotiability*, and to its statutory recognition as a *negotiable instrument*.

A NEGOTIABLE INSTRUMENT is one which, by a legally recognized custom of trade or by law, is transferable by delivery or by indorsement and delivery with the effect that, if the instrument is in itself valid (*i.e.*, free from forgery): (a) the holder of it for the time being may sue on it in his own name, and (b) notwithstanding any defect in the title of the transferor, the ownership in the instrument passes, free from all claims, to a *bona fide* transferee for value.

It is a general rule of law that no one can acquire a good title to property from a person who is not the true owner. But a person taking a negotiable instrument in good faith and for value is not affected by any defects in the title of the person from whom he takes it, even if that person is a thief, so long as the transferor does not hold the instrument by virtue of a forgery, which confers no title at all.

Hence, if there is any doubt as to whether or not an instrument is negotiable, a rough-and-ready test to apply is—*Can a perfect title be obtained through a thief?* If so, the instrument is negotiable; if not, the instrument is not negotiable.

Many instruments now recognized as negotiable have become so recognized by the custom of merchants, whose practice in this regard has been confirmed by the Courts. Among such instruments are Treasury Bills, share warrants payable to bearer, East India bonds, bankers' circular notes, and debentures payable to bearer. Other instruments are recognized as negotiable by Act

of *Parliament*, notably bills of exchange (including cheques and dividend warrants) and promissory notes. Foreign instruments are negotiable here only in so far as they are recognized as such by English mercantile usage.

### Who is the "True Owner"?

The *true owner* of a negotiable instrument is the person who is entitled to the property therein. There can be only one true owner of a negotiable instrument, and where, for example, a bearer cheque has been stolen and has come into the hands of a *bona fide* transferee for value, he, and not the person from whom it was stolen, is the true owner.

### Assignability

*Negotiability* must be distinguished from *assignability*. *Assignability* is the characteristic that permits the title to a *chosc in action* (i.e., a legal right that can be enforced by legal action, such as a debt or a share in a joint-stock company) to be transferred by one person to another, orally or in writing, provided written notice of the assignment is given to the debtor or to the person holding the funds or, in the case of shares, to the issuing company.

Whereas notice of an assignment must be given to the debtor or person holding the funds, no such notice is required in the case of negotiation. Furthermore, an assignment, whether legal or equitable, is always *subject to equities*, i.e., the assignee takes subject to any rights that the party liable or third parties may have against the assignor, and he can acquire only the same title as was possessed by the assignor. But a person who takes a negotiable instrument for value in good faith takes it "*free from equities*", i.e., he takes the instrument free from the rights of third parties and *free from any defect* in the title of a prior holder.

Suppose A owes B £50. B can transfer this right against A to C by assignment in writing, but C's right to the £50 is subject to any set-off or counter-claim which A may have against B. If, however, A gives B a bill of exchange for £50, B may transfer the note to C; and provided C takes the instrument *in good faith* (whether for value or not), he can claim payment of the £50 from A, and is not affected by any claim A may have against B.

### Transferability

Some instruments, though not negotiable, are *transferable*, i.e., they may be passed from hand to hand for value without the formalities of assignment in such a way that the ownership of them is transferred from one person to another without notice to the party liable. If everything is in order, the transferee obtains a



good title, but the absence of negotiability means that the transfer is "subject to equities", i.e., the rights of the transferee are liable to be defeated by any prior defect of title or by any defences that can be set up against any prior holder.

Bills of lading and other documents of title to goods are passed by delivery with or without indorsement, and persons taking them may sue in their own name without previous notice of the transfer to the party chargeable; but these documents are not negotiable instruments, for a holder in good faith and for value has no better title than that of his immediate transferor.

Postal Orders, though they are clearly marked "Not Negotiable", are often passed from hand to hand for value. So long as such an order has not been stolen, or obtained by fraud, each transferee gets a good title.

### Requisites as to Form of a Bill

S. 3 (1) of the Act thus defines a bill of exchange:—

3 (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

From this definition it will be seen that there are *eight* essential requirements of a valid bill. It must be (a) an *order to pay*; (b) *unconditional*; (c) *in writing*; (d) *addressed by one person to another*; (e) *signed by the person giving it*, i.e., the drawer; (f) made payable *on demand or at a fixed or determinable future time*; (g) drawn for a *sum certain in money*; (h) made payable to a *named payee or his order, or to bearer*.

An instrument that does not comply with this definition in every respect is not a bill of exchange.

#### 1. BILL PAYABLE AFTER DATE



£200

LONDON, 1st April, 19...

Three months after date pay to James Brown  
or Order the sum of two hundred pounds  
for value received.

To WILLIAM ARNOLD,  
62 ST JAMES' STREET,  
LIVERPOOL.

FRED DAVIES.

In this bill, Fred Davies is the *drawer*, who orders the *drawee*, William Arnold, to pay the sum of £200 to or to the order of the


*payee*, James Brown, three months after the date of the bill. In the simplest case, Arnold would be indebted to Davies who, in turn, would be indebted to Brown.

The drawer issues the bill by delivery to the *payee*, who will in due course present it to the *drawee*, who expresses his willingness to comply with the order by writing his signature across the face of the instrument, adding, if he wishes, the word *Accepted* and the date. By so doing Arnold is said to have "accepted the bill", and thereafter is liable in respect of his signature as *acceptor* to any persons who may subsequently take the bill in good faith and for value.

If Arnold does not obey the order of the drawer and refuses to accept the instrument, he is said to "dishonour the bill by non-acceptance", in which case he is not liable to anyone except, possibly, the drawer in respect of the original debt, if there was one. If Arnold accepts the bill, he may fail to pay it when it is presented for payment, in which case he is said to "dishonour the bill by non-payment". Then the holder has an immediate right of action against him, since Arnold is liable on his signature as *acceptor*.

When (or even before) he has obtained the *drawee's* acceptance to the bill, the *payee*, Brown, may hold the bill until it falls due for payment, or he may discount it or transfer it to another person. If he decides to transfer it, he signs his name on the back, *i.e.*, he *indorses* the instrument, and delivers it to the *indorsee*. In such circumstances, the holder Brown is said to "negotiate" the bill, and, by affixing his signature to the bill and delivering it, he thereby incurs the liabilities of an *indorser*, thus guaranteeing that, if the instrument is not paid at maturity, he will pay the amount to anyone who holds the bill with a good title.

## 2. BILL PAYABLE TO BEARER ON DEMAND

	£200	LONDON, 1st April, 19...
	On demand pay bearer the sum of two hundred pounds for value received.	
	To WILLIAM ARNOLD, 62 ST JAMES' STREET, LIVERPOOL.	FRED DAVIES.

In Example No. 2, the amount of the bill must be paid on demand to the bearer of the instrument, *i.e.*, the person in possession thereof.

## 3. BILL PAYABLE TO ORDER AFTER SIGHT

£200

LONDON, 1st April, 19...



Ten days after sight pay to James Brown or  
Order the sum of two hundred pounds for  
value received.

To WILLIAM ARNOLD,  
62 ST JAMES' STREET,  
LIVERPOOL.

FRED DAVIES.

Example No. 3 is a form of bill payable "ten days after sight", i.e., ten days after the bill has been exhibited to the drawee (William Arnold). The question of due dates is discussed on page 84, *et seq.*

## 4. BILL PAYABLE AFTER DATE WITH INTEREST

£125

LONDON, 1st April, 19...



Three months after date pay James Brown,  
or Order, the sum of one hundred and  
twenty-five pounds with interest at  $3\frac{1}{2}$  per  
cent. per annum, from date hereof to date  
of payment.

To WILLIAM ARNOLD,  
62 ST JAMES' STREET,  
LIVERPOOL.

FRED DAVIES.

Example No. 4 is a form of bill payable "three months after date", i.e., three months after the date appearing on the bill. It also stipulates that the drawee is to pay, in addition to the amount of the bill, interest on that amount at a fixed rate for a fixed period.

## A Bill Must be an Order

While the Act does not prescribe any particular form of wording for a bill of exchange, the whole definition must be complied with. Hence, bills tend to take much the same form, though they vary in method of expression. So long as the words employed are *not a mere request* but are *imperative*, the bill will be an order. The addition of mere words of courtesy does not invalidate a bill, so a bill drawn "Please pay J. Brown £100" is valid. Whether or not an instrument is an order does not depend on the contractual relationship between the drawer and the drawee. It is a matter of expression; for even though the drawee be not indebted to the drawer,

if the latter orders the former to pay and he accepts, he is liable as acceptor of a bill of exchange within the meaning of the Act.

### The Order Must be Unconditional

The order to pay must be free from conditions. There may be a conditional acceptance [(s. 19 (2a))] or a conditional indorsement (s. 33) of a bill, but the use of words importing a condition in the order to pay will take the instrument out of the category of bills of exchange and out of the operation of the Act.

On the other hand, words that *couple with the order a direction, to the drawee* do not necessarily make the order conditional, for, by s. 3 (3) :—

3 (3) An order to pay out of a particular fund is not unconditional within the meaning of this section ; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

Hence, instruments running "Pay A B or order £100 out of the money in your possession belonging to the A. Company", or "Pay to Thomas Brown £700 out of the proceeds of the sale of cargo shipped per ss. *Majestic*", are invalid, as each is an order to pay out of a particular fund. But an order to pay followed by the statement, "which please charge to my account concerning Liverpool property", is an unconditional order, since it is an unqualified order to pay coupled with an indication of the particular account to be debited.

Similarly, an order running, "Please pay to Messrs. X & Co. or Order £600 on account of moneys advanced by me for the A B Company", or "Please pay X Y or Order £120 against 20 chests of tea shipped by ss. *Majestic*", is quite valid as a bill.

The test of the conditional character of the order is *whether payment to the holder depends upon the fulfilment of any condition* rather than on the mere pecuniary capacity of the drawee to pay the bill when presented ; if it does, the order is conditional. Although a conditional form of order is not a bill, it may be used as evidence of a contract between the drawer and drawee, provided that it is properly stamped (and see page 249 as to conditional orders).

### Writing is Essential

By s. 2, "writing" includes "print". A typewritten bill or a printed bill or a bill written in pencil is valid provided the drawer signs, but the use of *ordinary* lead pencil is undesirable because of the risk of alteration or obliteration.

## A Bill must be "Addressed by one Person to another"

"Person" is defined by s. 2 as including "a body of persons whether incorporated or not", so that the drawer or drawee may be one or more individuals, or an incorporated body or a partnership.

By s. 6, *there may be more than one drawee*, but if there are, they must be addressed *jointly* and not alternatively or in succession.

6 (1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

Hence, an instrument addressed to "Thomas Robinson or James Brown", or to "Thomas Robinson and thereafter to James Brown", is not a bill, although an instrument is valid if addressed to "Thomas Robinson and James Brown".

As by s. 6 the drawee must be named or otherwise indicated with reasonable certainty, a person who purports to accept an instrument in which no drawee is mentioned cannot be made liable as an acceptor, for the instrument is not a bill of exchange. But he may be held liable on his signature as the maker of a promissory note.

5 (2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

Although an instrument in which drawer and drawee are the same person does not fall within the definition in s. 3 (1), because it is not addressed *by one person to another*, the effect of s. 5 (2) is that the holder is not prejudiced by this form. So, in the case of bankers' drafts (drawn by one branch on another, or on Head Office), the holder has all the rights of the holder of a bill of exchange drawn on a banker payable on demand.

## "Signed by the Person Giving It"

The signature of the drawer, though essential, need not be affixed at the time the bill is drawn; but, until the instrument is signed, it is incomplete or inchoate, and no action can be taken on it. But there may be an acceptance of an incomplete (*e.g.*, an unsigned) bill [(s. 18 (1))]. For example, a debtor may pay a debt by sending his creditor a form of bill which he has drawn up and accepted, leaving his creditor to sign his name as drawer.

## Payment must be of "A Sum Certain in Money"

An instrument which by its terms requires some other act to be done in addition to the payment of money is not a bill of exchange [(s. 3 (2))]. So that an instrument ordering the payment of money

and "the delivery of a wharf and horses" is not a valid bill. But a statement on the face of a bill that documents are to be given up either on acceptance or on payment does not affect its validity, since the statement is addressed to the holder and not to the drawee.

For the purposes of the Act, the term "money" means legal tender, so that an order to pay in "East India Bonds" does not comply with the provisions and is not a bill.

A bill is invalidated by the addition to the amount of any words which make the sum payable *other than a sum certain, i.e.,* indefinite or contingent. A bill ordering payment of "£100 and all fines according to rule" has been held to be invalid. But by s. 9:—

9 (1) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(a) With interest.

(b) By stated instalments.

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

If a bill is payable by instalments, the *instalments* must either be stated specifically or be *ascertainable from the wording of the bill*, as where the bill gives, in addition to the total amount, the number of instalments payable and the date of each instalment, or else the amount of each instalment. Thus, a bill for "£200 payable by two equal instalments due 1st March and 1st September" is valid; but a bill for "£200 payable by instalments" is not, though it might, perhaps, be treated as a bill for £200.

A bill may be drawn in foreign currency [s. 72 (4)], even though no rate of exchange is indicated.—*Cohn v. Boulken*, 1920. Such a bill is payable at the rate of exchange for sight drafts ruling at the place of payment on its due date, and, if action is brought thereon in our Courts, judgment will be given at that rate.—*Ullendahl v. Pankhurst*, 1923.

A discrepancy between the amounts expressed in words and figures will not invalidate a bill, for by s. 9 (2):—

9 (2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

Bankers usually refuse to pay cheques or bills in which the amounts expressed in words and figures differ, and return them with the answer "Words and figures differ". Occasionally, however, the smaller of the two amounts is paid.

## “On Demand, or at a Fixed or Determinable Future Time”

10 (1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

A cheque is a bill on demand in which no time for payment is expressed, e.g., “Pay James Brown or order ten pounds”.

A *determinable future time* is thus explained by s. 11:—

11 A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

(1) At a fixed period after date or sight.

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

The period of time a bill has to run before maturity does not affect the validity of the bill, *so long as the day upon which payment is to be made is definite or determinable and certain to occur*. Thus if payment is dependent on the occurrence of an event that is *certain to happen*, even though the actual date of its happening is unknown, then the bill is valid. Accordingly, an order to pay “Seven days after the death of A” is a good bill; but orders to pay “On the marriage of A” or “On the birth of a son to X” or “On the arrival of H.M.S. Connaught at Calcutta” are not bills, for there is no certainty that any of these events will occur.

## To whom Payment is to be Made

A bill must require payment to be made to a specified person or “to order” or “to bearer”; further, s. 8 (2) provides that “a negotiable bill may be payable either *to order* or *to bearer*”.

The term “bearer” is defined by s. 2 as “the person in possession of a bill or note which is payable to bearer”. By s. 8 (3):—

8 (3) A bill is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

An indorsement in blank is one that specifies no indorsee, i.e., where the payee or indorsee merely signs his own name and does not make the bill payable to another person. The payee or indorsee of a bill payable to order does not become the bearer of it *until he indorses it*, because, until then, it is not payable to bearer.

No person can become the bearer of a bill to which the indorsement of the payee or indorsee has been forged, since a forged signature is "wholly inoperative" (s. 24).

8 (4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Thus an order bill may be drawn payable (1) "to A or Order"; or (2) "to the order of A"; or (3) "to A". In each of these cases the effect is the same. The bill is a negotiable instrument in the hands of A, who has power to transfer or negotiate it by indorsement followed by delivery.

As a general rule, a bill is a fully negotiable instrument, but its terms may prohibit transfer, for, by s. 8 (1):—

8 (1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

The prohibitive words must clearly indicate an intention to restrict transferability, for the law will not imply such an intention if ambiguous words are used.

The most usual method of prohibiting transfer is to draw the bill in the form "Pay A *only*" without the words "or order" or "or bearer", or, if such words are printed on a cheque or bill, with those words clearly crossed out and initialled by the drawer. The word "only" is regarded as indicating the drawer's intention to restrict transfer and to require payment to be made to the named payee and no one else. In the case of a cheque, the words "Not transferable" may be added across the face. (See p. 174.)

A cheque drawn "Pay A. B. only or order", though ambiguous, should be treated as being not negotiable, in accordance with s. 8 (1).

### Certainty as to the Payee

7 (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

This certainty as to the payee must be obvious from the bill itself, but in cases of "latent ambiguity"—as, for instance, when the payee is misnamed or designated merely by description—evidence will be admitted to identify the payee. Thus if a bill is made payable "to the order of Jim Browne" evidence will be admissible to show that "James Brown" is the person intended to receive the money.



The certainty as to the payee is not affected by the fact that there may be one or more payees, for by s. 7 (2) :—

‘7 (2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

Examples of bills payable to the holder of an office for the time being are instruments running: “Pay to the Order of the Chancellor of the Exchequer”, or “Pay the Town Clerk, Bedford, or Order”.

5 (1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

A bill in which the drawer and payee are the same person would run “Pay Self or Order”, “Pay Ourselves or Order” or “Pay Order”. The case is not so easily understood where the drawee and payee are the same person, as when the drawee acts in two distinct capacities; for example, where he is trading on his own account and where he is also agent for another party interested in the bill.

This might arise where the drawee is the agent of a party to whom the drawer is indebted, while the agent himself is indebted to the drawer. Thus, the A. Co., Ltd., owes £100 for rent to a landlord C; B (the property agent of C) has bought articles to the value of £100 from the Company. The Company therefore draws a bill on B “Pay to your own order £100”, and B indorses the bill to C after acceptance by himself. The negotiation of such an instrument is essential to the establishment of any rights under it, as “the instrument is not a bill *which can be enforced* until the drawee has indorsed it away”<sup>1</sup>. Another common example is where a customer draws a cheque payable to his banker in settlement of some debt due to the latter.

## Inland and Foreign Bills

4 (1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this Act “British Islands” mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

The definition of “British Islands”, as given in this Section, is more comprehensive than the term “United Kingdom” used by the Stamp Act, 1891, in reference to the determination of

<sup>1</sup> Chalmers, *Bills of Exchange*, 10th Edn., page 20.

stamp duties (see Chapter 23). Since 1922, the term "British Islands" has not included the Irish Free State.

From a consideration of the foregoing definition of an inland bill, it follows that a bill is a *foreign bill* if:

(a) It is not drawn within the British Islands; or

(b) Being drawn within the British Islands, it is neither payable therein nor drawn upon someone resident therein.

Foreign bills vary considerably in form. They are often drawn in foreign currency, usually contain an indication of the transaction in respect of which they are drawn, may specify how the rate of exchange is to be determined, and may provide that documents attached, representing the goods against which the bill is drawn, are to be surrendered on acceptance or on payment. The following specimens illustrate these points.

### SPECIMEN OF FOREIGN BILL

FCs. 10,000      LONDON, 1st April, 19....

Six months after date of  
change (second and third of  
and date unpaid) to the order of Messrs.  
Cahuzac, Croquet & Co.  
value received.  
the value of the bill is ten thousand francs for  
the value of the bill is ten thousand francs for

IMPRESSIONED  
STAMP  
1/-

To MONSIEUR JACQUES BONHOMME,  
ROUEN.

Fred Davies & Co.

For the purposes of the Bills of Exchange Act this is an example of a foreign bill, for although it is *drawn* in the British Islands, it is *not payable therein nor is the drawee resident therein*. If the drawee had accepted this bill payable at a bank in London or at an address or office of his own in this country, the bill would be an inland bill, as it would be both drawn *and* payable in the British Islands.

### INLAND BILL PAYABLE ABROAD

£200      LONDON, 1st April, 19....

Six months after date of  
Co., or order, the sum of two hundred  
pounds for value received.  
Accepted by the drawee  
To WILLIAM ARNOLD,  
63 ST. JAMES'S SQUARE,  
LONDON.

IMPRESSIONED  
STAMP  
2/-

Fred Davies & Co.

## BILLS OF EXCHANGE

This is an example of an *inland bill*, for although it is payable abroad, it is drawn in the British Islands *on a person resident therein*. Moreover, the bill would be none the less an inland bill even if the payees, Brown & Co., resided abroad and indorsed or negotiated the instrument outside the British Islands, for the place of indorsement or negotiation does not affect the character of a bill as inland or foreign.

Apart from the question of stamp duty (see Chapter 23), one of the chief differences between inland and foreign bills is that, upon dishonour by non-acceptance or non-payment, a foreign bill *must* be protested, whereas in the case of an inland bill protesting is *optional*, except in certain circumstances (see Chapter 19). Another, less important, distinction is that inland bills are generally *sola* bills, *i.e.*, drawn in one part only, whereas foreign bills are usually drawn in "sets" of two or three parts.

When from the face of the bill it is uncertain or it cannot be definitely ascertained whether it is an inland or foreign bill, the holder may treat it as an inland bill [s. 4 (2) above].

### Importance and Effect of the Date of a Bill

Bills are generally dated by the drawer, but the omission of the date does not invalidate the bill [s. 3 (4)]. Moreover, s. 13 (2) provides that a bill shall not be invalid merely because it is ante-dated, or post-dated, or dated on a Sunday.

If a bill is issued undated, it will be deemed to be dated as at the time it was issued. The date appearing on a bill is *prima facie* the true date of the instrument, for by s. 13 (1) :—

13 (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

S. 9 (3) provides for the case in which a bill expressed to be payable with interest is issued undated :—

9 (3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Provision is made by s. 12 for the holder of an undated bill to insert the date :—

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

## Days of Grace and the Due Date

The importance of the date of bills payable at a fixed period *after date* is that it fixes the date of maturity or payment of the instrument, so that due presentment for payment may be made to the drawee.

A bill payable *on demand* or *at sight* is due on presentation at any time on or after the date of the instrument. A bill payable *after sight* is due at the expiration of the stated period from the time when the bill is first sighted by the drawee, while a bill *after date* falls due at the expiration of the stated period from the date of the instrument; but, in the case of all bills payable after date or after sight, three extra days known as "days of grace" are added, for by s. 14 :—

14. Where a bill is not payable on demand the day on which it falls due is determined as follows :

- (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—
  - (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;
  - (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day.
- (2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.
- (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.
- (4) The term "month" in a bill means calendar month.

Bills payable on demand, such as cheques, do not take days of grace, nor do bills drawn payable on a date "fixed" or "without grace".

A bill payable on a certain date fixed (*i.e.*, a bill that does not take days of grace) and falling due on a Sunday, Christmas Day or Good Friday, is regarded as payable on the *following* business day. S. 14 (1a) applies only to bills taking days of grace. Similarly a demand draft dated on a Sunday is payable the following day and, if presented on the Saturday preceding, it should be returned marked "post-dated".

Where a bill is made payable by instalments, days of grace are added in the case of each instalment; so if a bill for £100 is made payable by two equal instalments on May 1st and June 1st, the instalments fall due to be paid by the drawee on May 4th and June 4th respectively.

Days of grace are allowed on bills payable one, two or three days after date or after sight, but such bills are subject to the same stamp duty as bills payable on demand. (See Chapter 23.)

### Non-business Days

Ss. 14 (1a) and 14 (1b) cover bills that fall due on *non-business* days, *i.e.*, bank holidays, common law holidays and holidays appointed as such by Royal proclamation.

COMMON LAW HOLIDAYS are those which have resulted from very ancient custom, and which are now legally recognized as such. They include Sunday throughout the British Isles, and Christmas Day and Good Friday in England, Wales and Ireland.

BANK HOLIDAYS are appointed by the Bank Holidays Acts, 1871, 1875 and 1903. *In England and Wales*, they are Easter Monday, Whit Monday, the first Monday in August, and Boxing Day (26th December if that date is a week-day, otherwise 27th December if 26th December falls on a Sunday). The bank holidays *in Ireland* are similar, with the addition of St. Patrick's Day (17th March, if this day is a week-day, or 18th March if 17th falls on a Sunday). *In Scotland*, the bank holidays are New Year's Day (or if this day falls on a Sunday, the following day), the first Monday in May, the first Monday in August, Christmas Day and Good Friday.

Though Christmas Day and Good Friday are bank holidays in Scotland, they are common law holidays in England, Wales and Ireland. S. 14 attempted to unify the laws of England and Scotland relating to the due date of bills falling due on either of these days, by providing that, in both countries, when the last day of grace falls on Christmas Day or Good Friday, the bill shall be due on the *preceding* business day.

But those responsible for the Act overlooked the case where Christmas Day falls on a Saturday and the last day of grace falls on the following day, Sunday, 26th December. Since in Scotland

Christmas Day is a bank holiday, such a bill is payable there on the *succeeding business day*, i.e., Monday, 27th December, for, by S. 14 (1b), "when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the *succeeding business day*". But as Christmas Day is a common law holiday in England, Wales and Ireland, in those countries such a bill is payable on the *preceding business day*, i.e., Friday, 24th December.

As the term "month" means a *calendar month* and not a *lunar month* of four weeks, a bill dated, e.g., 30th June and payable one month after date falls due on 2nd August, i.e., three days after 30th July.

Where a bill is payable so many *months* after date or sight, no account is taken of "*lacking*" days in any month. Hence, a bill dated 31st December, and payable two months after date, falls due on 3rd March of the following year, whether or not the following year is a leap year. But a bill dated 1st February and payable 30 days after date is due on the 6th March in an ordinary year and 5th March in a leap year, for in such a case *days* and not *months* must be reckoned.

A bill cannot be dishonoured by non-payment before the last day of grace, and presentment for payment before that date is premature, except in those cases where the last day of grace falls on a Sunday or on a common law holiday, when, under s. 14, it is due on the preceding business day.

Where, in the case of bills payable *after sight*, the date of acceptance is later than the sighting date, the due date is calculated from the sighting date. So, if a bill payable one month after sight is accepted "Sighted 1st May, accepted 2nd May", the period begins to run from 1st May, not from 2nd May, and the bill falls due on the 4th June. Again, s. 65 (5) provides that, where a bill payable after sight is accepted for honour (see p. 227), the due date is calculated from the date of noting for non-acceptance and not from the date of acceptance for honour. The object of the law in these cases is to put the holder in the same position as if the bill had been duly accepted on presentation for acceptance.

In most foreign countries there are no days of grace, but "time" bills drawn in such foreign countries and made payable in this country take the three days of grace, for, "where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable" (s. 72).

Thus a bill payable after date drawn in Paris payable in London takes three days of grace, whereas a bill drawn in London payable in Paris is payable without days of grace.

## EXAMPLES OF CALCULATION OF DUE DATE

DATE OF BILL.	TERM OF BILL	DATE DUE
31st January.	One month after date.	3rd March in any year.
1st February.	One month after date.	4th March in any year.
1st February.	Thirty days after date.	6th March in an ordinary year. 5th March in leap year.
26th November.	Three months after date.	1st March in an ordinary year. 29th February in leap year
1st May.	Three months after sight, sighted and accepted 12th June.	15th September.
1st May.	Three months after sight, sighted 12th June, accepted 13th June.	15th September.
22nd November.	One month.	24th December, unless that day is a Sunday, when it is payable on the 23rd.
23rd November.	One month.	In the event of the 26th Decem- ber being a week-day, the due date is 27th in England, Wales and Ireland, but 26th in Scot- land. If 26th is a Sunday, due date is 24th December in Eng- land, Wales and Ireland, but 27th December in Scotland.
24th November.	One month.	27th December, but if the 26th is a Sunday, the 27th becomes a bank holiday in England, Wales and Ireland, and the bill is payable on the 28th.

## Bills in a Set

Foreign bills are sometimes drawn in sets of two or three parts, identical except that each part refers to the other two and only one is stamped. Loss is prevented by sending two parts for acceptance by different mails, whilst the other is negotiated at home. One part only should be accepted, or indorsed, otherwise the signer may be liable on two signatures. All parts form one bill, and should be fastened together when they reach their destination. Discharge of one is a discharge of the set, but the acceptor remains liable if he pays a part other than the one which bears his acceptance. If two or more parts are negotiated to different holders in due course, the one whose title first accrues is deemed the true owner as between such holders (s. 71).

## CHAPTER 11

### RIGHTS AND LIABILITIES OF PARTIES TO A BILL

BEFORE a person can become liable on a bill, he must have signed it *and* completed the contract by delivering the bill so as to give effect to his signature (ss. 21 and 23). He is then termed a *party* to the bill.

**SIGNATURE.** In regard to signature, s. 23 provides:—

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such : Provided that—

- (1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name :
- (2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

The signature may be the usual signature of the party or it may be his mark, or an impression of the signature by rubber stamp or by seal, as in the case of a corporation. Where John Brown, say, trades as "The Acme Cycle Co.", and signs bills in that name, he is said to sign in a *trade* or *assumed* name. The signature of a partnership may be effected either by all the partners signing their own names together or by the signing of the firm name by one of the partners.

The signature need not be affixed by a party himself, for, by s. 91, it may be affixed by any other person who signs with the authority of the person purporting to sign.

From s. 23, it follows that the mentioning of a person's name on the face of a bill as a "referee in case of need" or as a "case of need" (see Chapter 19) does not render that person liable as a party to the instrument, though he becomes liable if he signs his name to the instrument as an acceptor for honour.

**DELIVERY** is defined by s. 2 as "transfer of possession, actual or constructive, from one person to another", and by s. 21:—

21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that, where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

In spite of this, if a bill has come into the hands of a holder in due course (see p. 97), such a holder can hold liable any person who has signed the bill, even though there was no delivery by that person, because there is an irrebuttable presumption in favour of a holder in due course that delivery of a bill by any prior party has taken place (s. 21 (2), (see p. 110).



If the party to be charged is able to show that delivery of a bill was for a special purpose only, or conditional on the fulfilment of a condition, he may be able to avoid liability on his signature except to a holder in due course (s. 21 (2), see p. 110).

### Drawer of a Bill

It is not always easy to decide whether or not *constructive* delivery of a bill has taken place. Constructive delivery is the transfer of a bill without any change of possession, *e.g.*, where a person originally holding a bill on his own account subsequently holds the bill as agent for someone else without any change of possession; or where a person holding a bill as agent comes to hold it in his own right.

The signature of the drawer, *i.e.*, the person who addresses the order to the drawee, is essential to the validity of the bill. So, if A draws a bill on B but does not put his signature to it, and B accepts the bill which is then transferred for value to C, no action can be brought against any of the parties to the instrument until A adds his signature, for until this is done the instrument is invalid as a bill. The drawer of a bill may be an individual, or two or more persons, or an association, or a corporation sole (*e.g.*, the King), or a corporation aggregate (*e.g.*, a limited company).

### Drawee or Acceptor

THE DRAWEE, *i.e.*, the person to whom the bill is addressed, does not become a *party* to the bill *unless and until* he (a) signifies his willingness to be liable as acceptor by writing his signature across the face of the bill, either with or without the word "accepted" and the date; and (b) delivers the bill.

Since the acceptor's signature must be coupled with delivery of the bill in order to complete his contract, he may revoke his acceptance at any time before he delivers the bill. But where he gives notice to or according to the directions of the person entitled to the bill that he has accepted it, such notice is constructive delivery and his acceptance is irrevocable [s. 21 (1)].

Although s. 6 (1) (see p. 77) requires a drawee to be named or indicated, a bill that is not accepted by the drawee is nevertheless valid in the hands of any party provided that it is complete in all other respects; and any person who signs the instrument is liable in respect of his signature to any subsequent owner.

### Payee

THE PAYEE is the person to whom or to whose order the bill is expressed to be payable. When the bill comes into his possession, he becomes a *holder* (s. 2), but he does not become a party to the bill until he has *indorsed* it, *i.e.*, written his name on the bill and completed his contract by delivery. He is then known as an *indorser*.

Although there cannot be alternative drawees, there can be alternative payees, *i.e.*, a bill may be drawn payable to "Thomas Robinson or James Brown".

### Indorser

AN INDORSER is a person who, as a payee or indorsee, has signed and delivered a bill. By s. 2, an indorsement "means an indorsement completed by delivery". If a bill is originally or by indorsement payable to a person's order, the signature of that person as an indorser is necessary either for negotiating the bill or in order that it can be paid.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

In such cases it is usual to say that the person "backs" the bill. An indorsement properly so called can be made only by *the holder* so that, when a person who is not the holder of a bill or note backs it with his signature, he is not an indorser, but may be called a *quasi-indorser*.

### Capacity of Parties

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force — relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Since capacity to contract is in general enjoyed by all persons, it follows from the above section that, subject to the limitations mentioned below, the power to draw, accept or indorse bills of exchange is possessed by all persons. The word *persons* here includes all *legal persons*, who, although not persons in actual fact, are nevertheless persons in the eye of the law, *e.g.*, a joint-stock company and a corporation.

INFANTS. At law, a person under the age of 21 is an infant, and, as such, is incapable of incurring personal liability on bills, even to make payments for necessities (but see p. 38 as to cheques). An infant may, however, act as agent and bind others, while his signature as an indorser would serve to pass the title in a bill, though there would be no recourse against him personally in respect of the bill.

REGISTERED JOINT STOCK COMPANIES. *Trading* companies have *implied* powers to incur liability on bills in the transaction of their business, but *non-trading* companies cannot incur such liability

unless they are given *express* authority to do so by their Memorandum of Association or governing statute, as the case may be, though such companies usually have implied powers to issue cheques for making payments arising from their operations.

CORPORATIONS such as local authorities and municipal bodies have no *implied* power to contract by bill, though they may issue cheques for making payments necessarily arising out of their functions.

Cheques or bills issued by a joint-stock company or corporation may be under the corporate seal [s. 91 (2)], or under the signature of the company or corporation as written by its duly-appointed agent or agents (s. 30, Companies Act, 1929).

PARTNERSHIPS. A partner in a *trading* firm has implied power to bind the firm by acts done in the ordinary course of business, including the drawing and accepting of bills. A partner in a *non-trading* firm (e.g., a firm of solicitors) has no such *implied* power; he must be *expressly* empowered to act for the firm either by the Articles of Partnership or by special authority from all the partners. Nevertheless, if *all* the partners in a non-trading firm join in a bill, it will bind the firm, whether or not the use of bills is expressly authorized by the Articles.

### Signature by an Agent

To render a person liable as a party to a bill, it is not essential that he should *himself* sign the instrument [s. 91 (1)]. His signature may be written thereon by an agent, expressly or impliedly authorized to do so. Likewise, the signature of a firm, corporation, society, institution or registered company may be written or stamped on a bill by a duly *authorized* agent. In all such cases, the principal will be bound by the signature and liable on the instrument.

### Signature by Procuration

When an agent is authorized to sign bills on behalf of his principal, it is usual for him to do so by a "*per procuration*" signature. Thus where a person named Thomas Robinson gives his agent, William Brown, authority to sign bills on his behalf, the usual form will be—

*per pro. (or p.p.) Thomas Robinson,*

*William Brown.*

When bills signed in this way are dealt with, it is important to verify the existence and extent of the authority of the agent, for by s. 25:—

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

In the case of *Stewart v. Westminster Bank, Ltd.*, 1926, Stewart paid into his partnership account cheques which were drawn in favour of a limited company he had formed and which were indorsed by him for the company. The question was argued, but not decided, that a signature *on behalf of a limited company* is not a procuration signature within the meaning of s. 25, and that such a signature does not of itself put on inquiry any person who accepts it; that, since a company cannot sign except by the hand of a human agent, then, when it does so sign, the signature is in fact the company's own signature.

The section may thus be of chief importance in the case of bills signed "per pro." on behalf of individuals and non-trading partnerships. It is essential in such cases that the authority to sign *per pro.* and its limits be known to any party relying upon such a signature, for the principal is not bound if the agent has no authority. The form of such a signature is in itself a warning to any person taking the instrument that he may not get a title to the money.

Even where authority exists, the agent can bind the principal only to the actual extent of the authority. Suppose a clerk who has authority to draw cheques "per pro." for purposes of his principal's business draws a cheque "per pro." his employer and makes it payable to a bookmaker in payment of his own betting losses. If the bookmaker accepts the cheque, he may not be able to enforce payment against the principal, for the giving of such a cheque on behalf of his principal is outside the agent's authority, and the bookmaker should know that it is most unusual for a clerk to be in a position to give his principal's cheques in payment of his own gambling debts.

### Agent's Personal Liability

An agent's signature on a bill of exchange will not render him personally liable if the signature shows that he signed for a principal, for, by s. 26:—

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as agent, or as filling a representative character, does not exempt him, as such, from liability.

even to make payment. Whether a signature on a bill is that of the An infant may, however, agent by whose hand it is written, the construction signature as an indorser validity of the instrument shall be adopted. though there would be no reason that it may not be sufficient for the of the bill. same and to add the capacity in which

REGISTERED JOINT STOCK CO. for Thomas Robinson". If the implied powers to incur liability, his signature must indicate that he business, but non-trading company principal.

Particular care should be exercised in regard to signatures by officials on behalf of limited companies. In *Landes v. Marcus*, 1909, a cheque had stamped across the top the words "B. Marcus and Co., Ltd." and was signed at the foot "B. Marcus, Director; S. H. Davids, Director." It was held that the two directors were personally liable on the cheque.

On the other hand, in *Chapman v. Smethurst*, 1909, a promissory note bore the signature "J. H. Smethurst's Laundry & Dye Works, Ltd., J. H. Smethurst, Managing Director". It was held that the director was not personally liable despite the absence of any words such as "per pro." or "for and on behalf of" because the form of the signature made it reasonably clear that the director was signing as agent and not as principal.

31. (5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Suppose D, the holder of a bill payable to his order, dies, and that his executor X negotiates the bill by means of an indorsement signed "X, executor of D". X in such a case will be *personally* liable on the indorsement, unless he adds to his signature such words as "*sans recours*" or "without recourse to me personally".

## Forged and Unauthorized Signatures

If a person who purports to sign as agent on behalf of another has, in fact, no authority to do so, the signature will not bind the supposed principal; for by s. 24:—

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

Whether a signature is *unauthorized* within the meaning of this section is a question which has given rise to considerable controversy. The position is clear where one person, without authority, signs as agent for another person. In such circumstances the signature is totally without effect.

But the position is different where an agent, having actual authority, draws or indorses cheques or bills in accordance with the authority, but deals with the proceeds in a way that is inconsistent with the authority.

Suppose, for example, that Jones is empowered both to draw and to indorse cheques on behalf of Brown, and that Jones fraudulently (a) draws cheques on Brown's account in his own favour, and (b) misappropriates the proceeds of cheques payable to Brown but indorsed by him (Jones) by virtue of his authority.

In the first case (a), the paying banker can debit the cheques to Brown's account, for the cheques are drawn in accordance with the authority given to Jones. In regard to (b), it was considered for many years that such indorsements as those of Jones on behalf of Brown were valid, even though the proceeds of the instruments were misappropriated by an agent acting in abuse of his authority. The view taken was that the signature by the agent was, in fact, authorized, although the misappropriation of the proceeds of the instruments was not.

Doubt was thrown on this view by the decision in *Stewart v. Westminster Bank*, 1926, viz., that a signature by an agent who has authority to sign is entirely inoperative within the meaning of s. 24 unless both the actual signing and the application of the instruments and their proceeds are made in accordance with the express or implied authority of the principal.

As indicated above (p. 92), Stewart, a director with full authority to sign on behalf of his company, fraudulently passed into his private account cheques of his company which he had indorsed on its behalf. It was held that Stewart had no authority to sign for such a purpose, and that, as the company had done nothing to preclude it from denying his signature, such signature was inoperative and conferred no title even on the bank, which, in good faith, had given value for the cheques, and which had consequently to refund the amount of the cheques to the liquidator of the company.

### The Effect of Forgery

The general effect of forgery of a signature to a bill is to render the instrument inoperative. But this is not always the case.

A person whose signature has been forged may be stopped from pleading the forgery, and from denying that the signature is his, e.g., where a person, upon hearing that his signature has been forged, does not immediately disclaim it, or by his conduct induces the party who is seeking to hold him liable to act upon the signature as if it were a genuine one. (See also Chapter 13 in relation to forged signatures on cheques.)

Though a person can claim no title to a bill or cheque through a forgery, he may, nevertheless, have certain recourse in respect of the bill. He will have a right of action against (a) all parties to the bill who incurred liability thereon subsequent to the forgery (ss. 54 and 55); (b) his immediate transferor for value, if the latter has not indorsed, i.e., if the claimant is a transferee by

delivery (s. 58); (c) the forger; (d) possibly, the person whose signature has been forged, if that person is estopped from denying the validity of the signature.

Where a signature is *unnecessary to the passing of title* to a bill (*i.e.*, where it is not the signature of the payee or of an indorsee), the fact that it is forged will not affect the title of a subsequent transferee, though the latter will be unable to sue the person whose signature is forged. For example, a transferee's title to a bill originally made *payable to a named payee or to bearer* is not prejudiced by forgery of the *payee's* indorsement, since the *payee's* indorsement is unnecessary to pass the title to the instrument; nor will a forged indorsement placed on a bill merely by way of security prevent the passing of a good title.

For similar reasons, forgery of the *acceptor's* signature does not prevent the passing of a good title, since this signature is not essential to the negotiation of the bill. Forgery of the *drawer's* signature, on the other hand, has the effect of rendering the bill invalid, since the instrument cannot then be regarded as "drawn by one person on another"; nevertheless ss. 54 and 55 enable the transferee, in such a case, to enforce payment against all parties other than the drawer, while s. 58 enables him to enforce payment against a transferor by delivery.

A person taking a cheque through a forgery not only derives no title to the instrument, but also is liable to the true owner for conversion. (See Chapter 16.) The only exception to this rule is where a bill or cheque is negotiated abroad in a country under whose laws forgery does not prevent the passing of a good title, in which case subsequent holders of the instrument in good faith are not liable for conversion and may have a good title.

## Holder

S. 2 defines the "holder" of a bill as "the payee or indorsee of a bill or note who is in possession of it or the bearer thereof"; and "bearer" as "the person in possession of a bill or note which is payable to bearer".

By virtue of this definition, the holder of a bill may or may not be the person who is legally entitled to the instrument, while the person in possession of a bill may or may not be the holder. If A, the payee of a bill, indorses it in blank and gives it to a banker X for collection, then X and not A is the holder of the bill, for he is the bearer thereof. But if a person other than the payee of an unindorsed bill payable to order is in possession of it, he is not the holder. Thus the drawee of a bill payable to the order of a third party which has been sent to him for acceptance is not a holder, for he is neither the payee nor the indorsee of the instrument.

Again, a person who finds a bill payable or indorsed to some one else's *order* is not the holder, for he is not the payee, indorsee or bearer. On the other hand, the finder of a bill *payable to bearer either expressly or because it is indorsed in blank*, or a person who steals such a bill, is a holder, although an unlawful holder, *i.e.*, his possession of the bill is unlawful; but, as the bill is payable to bearer, he can give a valid discharge to anyone who pays it in good faith, and he can give a good title to anyone who takes the bill before maturity in good faith and for value [s. 38 (3)].

A person who takes a bill affected with forgery is not the holder of the bill, since he is neither the payee, the indorsee nor the bearer. Thus, if a bill is payable to A *or order*, and A's indorsement as payee is forged by B, who transfers the bill for value to C, C is not the holder of the bill, but is merely the person in possession of an undorsed "order" bill.

The holder of a bill may sue upon it in his own name, and although his own title be defective, he can give to one who innocently takes the bill for value without notice of such defect a better title than he himself possesses.

## Consideration

The word "value" used in relation to bills means "valuable consideration", which has been defined as "some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other". (*Currie v. Misa*, 1875.) Consideration is thus a return or *quid pro quo* given by one person in respect of a promise made by another, with the result that the promise is not made *gratuitously*. As a rule, consideration takes the form of a transfer of goods or the performance of some service in return for payment.

Like any other simple contract, a bill requires the existence of consideration in order that it may be enforceable against a party sought to be charged, for proof of the absence of consideration as between a transferor and transferee is a good defence by the transferor against the transferee.

It is a principle of law that consideration must not be *past*. This means that, as a general rule, the consideration for a contract must pass between the parties *at the time when the contract is made*, so that an *antecedent* debt or liability is not valuable consideration for a subsequent agreement. In respect of bills of exchange and promissory notes, however, s. 27 provides:—

27. (1) Valuable consideration for a bill may be constituted by—

- (a) Any consideration sufficient to support a simple contract;
- (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.



In any action on a bill there is a legal presumption, which may be rebutted (see "Accommodation Bills", page 100), that the defendant has received consideration, for by s. 30 (1) :—

30. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

Although consideration is always *presumed* to have been given, it need not be stated in the bill itself, for by s. 3 (4) :—

3. (4) A bill is not invalid by reason—

(b) That it does not specify the value given, or that any value has been given therefor.

The words "for value received", usually inserted in a bill, are *prima facie* but not conclusive evidence that consideration has been given in respect of the bill.

Any party to a bill, even if he did not himself give value, is liable to the holder if value is given by a subsequent party; and this is so whether the holder gave value or not. In such a case, the holder need not prove that he gave value. For example, B draws a bill on A, who accepts for no consideration. B indorses the bill to C for value, who indorses it to D for no consideration. D, the gratuitous holder, can sue A or B, even if he knows that A is a gratuitous party. D cannot, however, sue C, for want of consideration is a good defence between immediate parties.

## Holder in Due Course

In contradistinction to a mere holder, whose title may be defective and who may be unable to sue on a bill in his own name, a *holder in due course* [as defined in s. 29 (1)] has an unassailable title :—

29. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely :—

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact :

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

By this section, five conditions must be fulfilled before a person in possession of a bill can be a holder in due course, *viz* : (1) he must

be a holder ; (2) the bill must be complete and regular on the face of it ; (3) it must have been taken by the holder before it was overdue, without notice that it had previously been dishonoured ; (4) it must have been taken in good faith and for value, and (5) it must have been taken without notice of any defect in the title of the person who *negotiated* it.

The first requisite of the title of a holder in due course is that he must be a *holder* ; and he cannot be a holder if the bill is affected with forgery, since a forged signature is " wholly inoperative ". But the title of a holder in due course is not affected by any *defect* in the title (as distinct from *complete absence* of title) of the person who negotiated the bill to him [s. 38 (2)]. He holds the bill free from such defect, as well as from mere personal defences such as set-off or counterclaim available by prior parties amongst themselves, and he can enforce payment against all parties liable on the bill. Thus, in the example given on page 96, C, owing to the forgery of A's indorsement, cannot be a holder in due course because he is not even a holder. But if the bill had been payable to A or *bearer*, and had been stolen by B before he transferred it to C, the latter, provided that he took the bill before it was overdue and satisfied the other requirements of s. 29, would be a holder in due course, with every right to enforce payment of the bill against all prior parties.

A person cannot be a holder in due course unless the instrument has been *negotiated* to him. Negotiation in the case of a bill payable to order requires *indorsement* completed by delivery [s. 31 (3)]. Hence the payee of a bill to order cannot be a holder in due course, since the bill is not indorsed to him by the drawer (*R. E. Jones, Ltd. v. Waring & Gillow, Ltd.*, 1926).

A person cannot be a holder in due course of a bill if he knows of any defect of title of the person from whom he received it. Notice of defect of title for this purpose means actual though not formal notice, that is, either actual knowledge of the facts or a suspicion that something is wrong combined with a wilful disregard of the means of confirming such suspicion.

A person cannot be a holder in due course of a bill which is *void* for any reason, *e.g.*, a bill given by an infant, which is void under s. 5 of the Betting and Loans (Infants) Act, 1892.

A holder in due course has an absolute title to the bill against all the world, and he can take action on the bill in his own name against any or all of the prior parties thereto, free of all defences based upon defective title and of mere personal defences available to prior parties among themselves. Thus it is no defence to his claims that the bill had been stolen or lost or that the party sued did not receive value from his transferee. Moreover, a holder in

due course can give a good title to any person to whom he passes the instrument, whether for value or not, for by s. 29 (3) :—

29. (3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Even if the person taking from a holder in due course has *knowledge* of fraud or illegality affecting the bill, he has all the *rights* of the holder in due course provided that he is not a *party* to the fraud or illegality; but he is not himself a holder in due course.

### Holder for Value

A HOLDER FOR VALUE is usually a holder who has himself given value for a bill, but a person who has not *himself* given value may be in the same position as if he had given value, for by s. 27 (2) :—

27. (2) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

If, therefore, a holder for value indorses a bill to an agent for collection, the agent can sue the acceptor but not his own principal. Chalmers<sup>1</sup> has expressed the principle as follows: "The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it".

The terms "holder for value" and "holder in due course" should be clearly distinguished. If a person holds a bill for which value has at any time been given he is a holder for value, and it does not matter who gave value. But a person cannot be a holder in due course unless he has *himself given value*, though he may have the rights of a holder in due course [see s. 29 (3) above].

A holder in due course is always a holder for value, and something else in addition. But a holder for value is a holder in due course only if he has satisfied all the conditions. A holder for value may or may not have himself given value for the bill, but he has all the rights of the person from whom he received it against all *prior* parties to the bill; and, unless he is also a holder in due course, no more than those rights. If he has not himself given value, he has *no* rights against the person from whom he received the bill; but in such a case he can negotiate the instrument to a holder in due course and give him a complete title.

<sup>1</sup> Chalmers, *Bills of Exchange*, 10th Edn., p. 102.

## Lien on a Bill

Bills of exchange, like other negotiable instruments, may be the subject of *lien* (see Chapter 7). In this connection, s. 27 (3) provides that :—

27. (3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

In the absence of special agreement to the contrary, a banker who has advanced money to a customer has a *lien* in respect of such advances on all negotiable instruments of that customer which come into his hands in the ordinary course of business as a banker. Hence, if Jones owes his bank £100 and hands to the bank a bill for £200 for collection, the bank can retain £100 of the proceeds, or, if the bill is unpaid, can hold the parties to the bill liable for its face amount (£200), though any amount recovered in excess of £100 must be paid to Jones.

## Accommodation Parties and Accommodation Bills

28.—(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

If there are two or more *consecutive* accommodation parties to the bill, none of them can sue the other or others. But an accommodation party who is called upon to pay may look to the party accommodated, since the latter impliedly undertakes either (a) himself to take up the bill, or (b) within a reasonable time before maturity to provide the accommodating party with funds to meet the liability, or (c) to indemnify the accommodating party against the consequences of non-payment.

The fact that one (or more) of the parties to a bill is an accommodation party does not necessarily make the bill an *accommodation bill*. "An accommodation bill is a bill whereof the *acceptor* (i.e., the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto. This distinction is material when questions arise as to what is a discharge of the bill. An accommodation bill is discharged by the person who is in substance, though not in form, the principal debtor [see s. 59 (3)], or if time be given to such person".<sup>1</sup>

Hence, a bill which has been signed by the drawer in order to accommodate an indorser, or which has been "backed" by a

<sup>1</sup> Chalmers, *Bills of Exchange*, 10th Edn., p. 105.

person who signs it as an indorser, is not an accommodation bill in the strict sense of the term, for in such a case the acceptor is the principal debtor and not a surety. Payment of a bill of this kind by the person accommodated does not discharge the instrument, for the acceptor remains liable until *he* pays. On the other hand, payment of a *pure* accommodation bill by the party who has been accommodated by the acceptor will operate as a total discharge of the instrument [s. 59 (3)].

Suppose X accepts a bill drawn by A for the latter's accommodation, and the instrument is indorsed for value to B and C. C sues the acceptor X, but it is no defence on X's part to show that the bill was accepted merely for the drawer's accommodation. Even if C had not given value, he may recover from X if B gave value; but if in such circumstances C sued B, B could successfully plead the absence of consideration as between himself and C. Moreover, if the drawer A paid C, he could not recover from the acceptor X, for X accepted merely for the drawer's accommodation.

It may, however, be added that bills of the second class above mentioned are frequently described as, or considered to be, accommodation bills from the *commercial* as distinct from the legal standpoint.

### Fictitious and Non-existing Payees

7. (3) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

The practical importance of this section is revealed in cases where the payee's indorsement has been forged. If the payee is fictitious or non-existing within the meaning of the section, the bill is payable to bearer, and a person who has given value for it in good faith can enforce payment as a holder in due course; but if the payee is not fictitious or non-existing, a person who has given value in good faith after the forgery is not even a *holder*, since he has no title whatever to the forged bill.

*Prima facie*, the term *non-existing* payee refers to some purely imaginary individual, such as "The Man in the Moon" or "Old King Cole", but the payee may be a fictitious or non-existing person in spite of the fact that a living person bears his name, if the drawer of the bill had no intention of his having any title to the bill.

If the drawer, in signing, did not intend the named payee to receive payment, then the payee is fictitious whether he exists or not, and whether or not the drawer knew he existed.

In *Clutton v. Attenborough*, 1896, a clerk induced his employer to draw cheques payable to "*Brett*," a non-existing person. The clerk indorsed the cheques in this name and appropriated the

proceeds. Attenborough & Sons, who had given value for the cheques in good faith, sued the drawer. It was held that, as "*Brett*" was a *non-existing* person, the cheques were payable to bearer, and that the drawer was liable to the holder.

In *Vagliano Bros. v. Bank of England*, 1891, the plaintiffs had accepted bills of exchange payable at the Bank of England purporting to be drawn by A to the order of B & Co., both A and B & Co. being customers of the plaintiffs. Subsequently it was discovered that the plaintiffs' clerk had forged the signatures of both A and B & Co., and, by indorsing the bills in the name of B & Co., had obtained cash for the bills from the Bank. The plaintiffs claimed that the Bank had paid on a forged indorsement and could not, therefore, debit their account; but the Bank pleaded that the bills were bearer bills within the meaning of s. 7 (3), and that they had accordingly obtained a good discharge, *i.e.*, they were not affected by the forged indorsement.

It was held that this view was correct; that the payees, although actual persons, were nevertheless "*fictitious*" within the meaning of the Act, as *the drawer, i.e., the clerk, did not intend payment to be made to the person named.*

In another case, *Vinden and Rogers v. Hughes*, 1905, this defence failed, as it was held that the payees were not fictitious, since *the drawer (i.e., the employer) signed the cheques with the intention that the payees should receive payment.* It does not matter how much the drawer of a cheque may have been deceived if he honestly *intends* that the cheque shall be paid to the person designated by him.

Cheques drawn in favour of "*Wages*" or "*Rent*" are not payable to fictitious or non-existing persons. They cannot, therefore, be regarded as payable to bearer. (See p. 155.)

## THE LIABILITIES OF PARTIES TO A BILL

No one is a party to a bill and, therefore, liable on it, unless his signature appears on it.

### Presumption as to Value and Good Faith

30. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

This means that any person who is the holder of a bill can *im* the rights of a holder in due course against any prior parties.

But if in any action against one of these parties evidence is produced showing that there is a defect in the title to the bill, the holder must prove that value has been given for the bill in good faith *since* the defect occurred. If the holder can succeed in proving this, the party sued will be unable to escape liability unless he can show that the plaintiff had not satisfied one of the other requirements of s. 29 (1) and was therefore not a holder in due course.

If the holder cannot prove that value has been given since the defect occurred, his claim will fail altogether.

### **Void and Voidable Contracts on a Bill**

Since a bill of exchange is a document embodying a contract, every party to a bill is a party to a contract. If the transaction in respect of which any person signs a bill is lacking in any of the essential features of a valid contract, the contract is either *void*, *voidable* or *unenforceable*, and the liability of the party concerned is restricted accordingly.

A contract is *unenforceable* when, although valid, it cannot be enforced by legal action because it does not comply with some statutory requirement. An example of this occurs when the rights of action on a bill are statute-barred, *i.e.*, when the six-year period during which, by Statute, the action must be brought, has expired (see p. 29). Although such a bill may be in every way valid, no action can be brought against a party to it unless that party, before the expiration of six years from the due date of the bill, has made part payment or given an independent written acknowledgment of his liability on the bill.

More difficult questions arise where the contract evidenced by the signature of a party to a bill is *void* or *voidable*.

A contract may be *void* for one of several reasons; but the most important point in connection with bills of exchange is that a contract depends for its validity upon the existence of a power to contract and an intention to contract. The general rule is that, if the contractual capacity of a party to a bill is so restricted (as in the case of an infant) that he has no power to incur liability on a bill, the contract of which his signature is evidence is void, and there can be no action against him on the bill, though an action may lie against the other parties.

Such *absolute* defect in contractual capacity is to be distinguished from a mere *temporary* defect, which has only the effect of rendering the bill *voidable*. Thus, if a person signs a bill whilst lunatic or drunk, and the incapacity is known to the other party to the contract, the party who was incapable may repudiate or affirm his liability when the incapacity has ceased, except as against a holder in due course. (See p. 97.)

If a person does not sign of his own volition, but as the result of fraud, duress or misrepresentation, the contract is either void or voidable. If the fraud is such that the person signing intended to put his name to a totally different document, the contract is void, and he can escape all liability on the instrument, even to a holder in due course. In *Foster v. Mackinnon*, 1869, an old man of feeble eyesight was, without any negligence on his part, induced to indorse a bill under the belief that he was signing a railway guarantee. It was held that he was not liable to a holder in due course. Similarly, in *Lewis v. Clay*, 1897, the defendant signed a promissory note under the belief that he was witnessing a legal document; it was held that he was not liable on the instrument.

If, therefore, the contract evidenced by a signature on a bill is void, the person signing can escape liability even to a holder in due course. But if a contract is merely voidable, only the persons making the contract are affected, and the rights of a holder in due course remain intact.

The fact that a signature to a bill is obtained by fraud or misrepresentation is not sufficient to render the contract void if the person signing is aware of the true character of the instrument. The contract is merely voidable, and the person signing, although not liable to the party responsible for the fraud or misrepresentation, is nevertheless liable to a holder in due course who has taken the bill after value has in good faith been given for it subsequent to the fraud or misrepresentation.

### Liability and Warranties of the Drawer

55. (1) The drawer of a bill by drawing it :—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken.
- (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

“Due presentment” means presentment for acceptance and payment in accordance with the rules laid down in the Act. A bill is accepted “according to its tenor” when it is accepted generally (*i.e.*, as drawn). If it is not so accepted (*i.e.*, if a qualified acceptance is given), the holder is entitled to treat the bill as dishonoured. As the drawer undertakes that the bill shall be accepted and paid according to its tenor, he is discharged if a qualified acceptance is taken without his consent (s. 44). But if a qualified acceptance is taken with his consent, he engages that the bill will be duly paid according to its tenor as qualified by the acceptance.



This general undertaking of the drawer may be limited in accordance with the provisions of s. 16 (1), which provides that the drawer of a bill, and any indorser, may insert therein an express stipulation negating or limiting his own liability to the holder. Thus the drawer may qualify his signature by adding the words "Sans recours" or "Without recourse to me", in which case he does not undertake to pay the holder in the event of dishonour.

S. 55 (1 b) operates to prevent the drawer from denying to a holder in due course the payee's existence and his capacity to indorse at the time the bill is drawn, but does not impose upon him any responsibility for the genuineness of the signature of the payee.

### Liability of the Acceptor

53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee.

Suppose Jones owes Brown £100 and Brown draws a bill on Jones for the amount, then transfers the bill to Robinson in payment of a debt. If Jones refuses to accept, Robinson (the holder) cannot, in England, sue him on the bill or sue him in the capacity of assignee of the debt owed to Brown by Jones, though, in Scotland, he could claim to have an assignment of the amount of the bill out of the debt due by Jones as from the date the bill was presented to Jones. The operation of the section so far as it refers to cheques drawn by customers on bankers is explained in Chapter 13.

When the drawee of a bill accepts it, he becomes primarily liable to all subsequent holders for value. The liabilities of the acceptor are set forth in s. 54 :—

54. The acceptor of a bill, by accepting it :—

(1) Engages that he will pay it according to the tenor of his acceptance :

(2) Is precluded from denying to a holder in due course :—

- (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;
- (b) In the case of a bill payable to the drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;
- (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

It will be seen that the acceptor is liable only according to the *tenor of his acceptance*. So that, on a bill which is altered in amount after his acceptance, the acceptor is not liable except to a holder in due course for the amount of the bill as originally accepted (see "Material Alteration", p. 113).

The effect of s. 54 (2) may be illustrated by considering the case of a bill drawn by Brown on Robinson, payable to Jones. The bill is passed to the payee Jones before acceptance and he indorses the instrument to Andrews, who takes it as a holder in due course and obtains Robinson's acceptance. Robinson cannot question the existence of the drawer Brown, or his capacity or right to draw the bill, or the genuineness of his signature; nor can he question the existence of the payee Jones, or his capacity to indorse. On the other hand, Robinson does not take any responsibility for the genuineness or validity of the indorsements of either Jones or Andrews, in spite of the fact that Jones' indorsement was on the instrument at the time of acceptance.

### Liability of an Indorser

55. (2) The indorser of a bill by indorsing it :—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;
- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

The provisions of s. 55 (2a) are similar to the provisions applicable to the drawer under s. 55 (1a), *ante*. But while the drawer undertakes to compensate any indorser whatsoever, the indorser undertakes only to compensate any indorser *subsequent to himself* who may have been called upon to pay the bill. An indorser is not liable to compensate a *prior* indorser.

The words "according to its tenor" in s. 55 (2a) must be taken to mean the tenor of the bill *at the time it was indorsed*, so that an indorser would be liable to a subsequent indorser for the increased amount of a bill if the amount had been altered after drawing or acceptance but *before he indorsed*. Moreover, if a person indorses a bill which is forged, he cannot plead the forgery in defence to an action by a transferee subsequent to himself.

By virtue of s. 56 (see p. 290), the liability of a quasi-indorser is the same as that of an indorser.

## Order and Ratio of Liability of Parties

There are two periods of time to be considered when ascertaining the order of liability on a bill, *viz.* : (a) before acceptance, and (b) after acceptance.

*Order of Liability of Parties before Acceptance.*—Before acceptance, the *drawer* is primarily liable, and the indorsers, if any, are sureties for him. Suppose A draws a bill on B and delivers it to C who indorses it to D, who indorses it for value to E. If B has *not* accepted, A (the drawer) is the party who is ultimately liable, *i.e.*, he is the principal debtor, and E, the holder, can sue A immediately on dishonour without suing C or D, who are merely in the position of sureties for A. Or E can sue D only, or he can sue A, C and D together ; but whichever party is sued has a right of action against a previous party until the liability eventually rests on A, who has no action on the bill against B, but can sue B for the consideration, if such there was, in respect of which the bill was drawn.

*Order of Liability of Parties after Acceptance.*—In this case, the *acceptor* is the party primarily liable and the drawer and indorsers are sureties for him. Thus, if B in the above example accepts the bill, then he is primarily liable. In the event of dishonour by B, E can sue B, or A or C or D individually, for the whole of the amount, or he may sue A, B, C and D together.

The parties to a bill are not in the position of ordinary sureties who can claim division of the liability. *Each* party is severally (*i.e.*, *individually*) liable for the whole amount ; he cannot claim that he is liable only for a proportionate amount according to the number of parties. The right of any party (other than the acceptor) who is compelled to pay is to sue any prior party for the *full amount* of the bill, and the party so sued must in turn proceed against any parties prior to him.

The order of liability amongst the indorsers is that in which the indorsements are affixed, *i.e.*, the order of liability is from a subsequent party to a prior party. Thus, in the example given, the holder E can sue any or all of the *prior* parties A, B, C or D, but, if C had to pay the bill, he could not sue either D or E as these are parties subsequent to him, although he could sue either A or B.

Difficulty sometimes arises because the indorsements do not appear in the order in which the bill was actually negotiated, and then oral evidence has to be admitted to prove the order in which the indorsers are liable.

The amount of damages that a person who has paid may recover from a prior party is provided for in s. 57. (See Chapter 19.)

## Liability of a Transferor by Delivery

Although only those persons who have signified their consent to incur liability on a bill by affixing their signature thereto are properly described as *parties*, a certain responsibility is assumed by a person who, being in possession of a bearer bill (*i.e.*, one which originally or by indorsement is payable to bearer), negotiates it without indorsing it. Thus s. 58 provides that :—

58. (1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery".

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Although not liable on the instrument, as are the acceptor, drawer and indorser under ss. 54 and 55, a transferor by delivery may be liable on the three distinct grounds that : (a) the instrument transferred by him was not genuine ; (b) he had no right to transfer the instrument ; and (c) he knew the bill was valueless at the time of transfer.

If the bill is *sold* or discounted and is not indorsed by the transferor, the transferee, in the event of dishonour, cannot sue the transferor as a party to the bill ; he can sue only on the warranties indicated in s. 58. Hence, if the bill turns out to be valueless, the transferee has no recourse against the transferor unless he can show that the transferor *knew* that the bill would not be paid. But if the bill is unpaid because of forgery, then the transferee can sue the transferor on the warranty of genuineness.

These remarks apply to a banker who discounts a bill for a holder who does not indorse the instrument. If the bill is dishonoured, the banker cannot sue the transferor unless the transferor had no right to discount it, or knew the bill was valueless at the time he offered it for discount, or the bill was not genuine.

If the bill is not sold, but is given in settlement of a pre-existing debt by a transferor who does not indorse, the usual position is that the bill operates as *conditional* payment, *i.e.*, if the bill is dishonoured, the debt against the transferor revives though he is not liable on the bill. If, however, the transferee takes the bill in *final* and unconditional discharge of the debt, he has no rights against the transferor in the event of dishonour, either on the bill or in respect of the original debt. His only rights are those under s. 58 (3).

## NEGOTIATION, ITS MEANING AND EFFECT

As has been stated, the important characteristic of a negotiable instrument is that the property therein may be transferred by simple delivery of the instrument, or by indorsement followed by delivery, so that the transferee obtains a title free from all equities and may sue on the instrument in his own name. The transfer of the majority of negotiable instruments is not governed by statute law, but the conditions governing the transfer of bills of exchange are clearly defined in the Bills of Exchange Act, 1882. They are best considered under the three headings: (1) Issue; (2) Delivery; and (3) Transfer.

## Issue of a Bill

The mere fact that the drawer of a bill completes it and appends his signature does not render the bill operative as a negotiable instrument, for the career of the document as a bill does not begin until it is properly *issued*.

S. 2 defines issue as "the first delivery of a bill or note, complete in form, to a person who takes it as a holder." There can be no legal issue of an *incomplete* instrument, except that by s. 3 (4), a bill is not invalid by reason that it is not dated, while s. 13 (2) visualizes the issue of an undated bill.

The deposit by the drawer of a completed bill with an agent or other person to await his (the drawer's) instructions or *for a special purpose only*, is not a valid issue of the bill.

## Meaning of Delivery

No person becomes liable on a bill until his signature thereon is coupled with *delivery* of the instrument, *i.e.*, actual or constructive transfer of possession of the bill from the person signing to the transferee.

*Actual* delivery takes place when the instrument is handed by the transferor to the transferee or his agent, but it is not always so easy to prove that *constructive* delivery has taken place. Constructive delivery is some act that involves a change of ownership without physical transfer, *e.g.*, where an indorser notifies the indorsee that he holds the bill at the latter's disposal, or where a bill in the hands of an agent of the owner becomes that agent's property in his own right.

In determining whether constructive delivery has taken place, it is the *intention* that is of importance, so that if a person who has signed can show that he had no intention of delivering the instrument, he is not liable thereon. But if by his conduct—or by communication—he induces another person to infer that the bill

will be delivered, and such person acts on that presumption to his detriment, the former would be barred by "estoppel" from denying delivery, and would have to abide by the consequences of his action.

It follows that no property in a bill or cheque will pass if the transferor (a) does not actually hand it to the transferee with the intention of passing the property to him, or with the same intention informs him that the bill or cheque is at his disposal; or (b) hands it to another person for a special purpose only, e.g., to be held in safe keeping, or for any other specific purpose, such as to meet another bill.

21. (2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery :—

- (a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be;
- (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who has signed it as a drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

"Immediate parties" to a bill are those who are in direct or immediate relation to each other, e.g., the drawer and acceptor, or the drawer and the first indorser (the payee), or the first and second indorsers. Other parties are *remote*, e.g., the acceptor and the first indorser, or the drawer and the second or third indorser.

The general rule of law is that oral evidence is inadmissible to vary the effect of a written contract, but s. 21 (2b) provides that evidence may be admitted as between immediate parties, and as regards a remote party other than a holder in due course, to show that delivery of the bill was conditional only and was not intended to be effectual as a transfer of the property in the bill. In other words, the drawer may bring such evidence as a defence to a claim on the bill by the payee or first indorser, or the acceptor as against the drawer, or the second indorser against the third indorser, for in such cases the parties are "immediate", and it does not matter when the parties are immediate whether or not the plaintiff claims to be a holder in due course, for, if the defendant's contention that there has been no delivery is correct, the plaintiff obviously cannot be a holder in due course.

But the acceptor cannot bring evidence to dispute the payee's claim, or an indorser's claim, if any such party is a holder in due course. In *Ingham v. Primrose*, 1859, A drew a bearer cheque

intending to deliver it to B, but before A issued the cheque to B it was stolen from his possession, and was subsequently negotiated to C, who took it as a holder in due course. C was able to sue A, since as against a holder in due course a valid delivery from A to B and between all parties prior to C was conclusively presumed.

But suppose a promissory note is made by B payable to a banker C and is handed by B to C as collateral security for an overdraft on current account. Then the banker C cannot sue B on the note if the account is in credit, for in such a case B and C are immediate parties and the delivery was conditional. In like manner, the transfer of a bill to another party for discounting on behalf of the transferor will be ineffective as a delivery of the bill except as against a holder in due course.

The burden of proving that there has not been a valid and unconditional delivery within the meaning of this section rests on the person who seeks to evade liability on that ground.

### Delivery by Post is sufficient

Delivery of a bill, to be valid, need not be made in person; it may be made by post or by any other agency. So, if a bill is indorsed by Robinson and sent by post to an indorsee Brown at the latter's request, the delivery is valid and effectual. The post in such circumstances becomes Brown's agent, so that Robinson cannot recover the instrument once it is posted, and Brown must bear any loss which may arise if the bill is stolen during transit. On the other hand, if there is no express or implied request on the part of the receiver that the post shall be used for delivering, the Post Office is the agent of the *sender*; there is no delivery until the letter containing the bill has been handed by the Post Office to the addressee, and any loss in the post must be borne by the sender.

### Inchoate Instruments

20. (1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Reference should be made to s. 12 as to the omission of the date. In connection with s. 20, several important points require notice.

The section provides that the instrument must be not only signed, but also *delivered for the purpose of converting the instrument into a bill*. So long as delivery of an incomplete stamped document for completion *as a bill* can be proved, then no person who has signed it can avoid liability to a holder in due course. But, if such an instrument is stolen or misappropriated while it is still incomplete, and is subsequently fraudulently completed and negotiated, proof by the party sought to be charged that there was no delivery by him will defeat any action taken on the instrument even by a holder in due course because the instrument, for want of proper delivery, never becomes a bill. Thus, in *Baxendale v. Bennett*, 1878, a blank acceptance was stolen from the acceptor, A, and, having been filled up as a bill, was negotiated to a holder in due course. The latter was unable to recover from A, on the grounds that the instrument was incomplete or inchoate when it left A's possession, and A was able to prove that there had been no delivery of the instrument by him.

In like manner, a person can avoid liability, even to a holder in due course, if he can prove that there had been no delivery by him of an incomplete instrument to be converted into a bill or note, because he had handed it to another person *for safe custody only*, or for some purpose other than for conversion into a bill.

Thus, in *Smith v. Prosser*, 1907, the defendant handed two blank forms of promissory notes bearing his signature to his agent, with instructions that the agent was to keep the notes until he was authorized by the signer to fill them up as promissory notes and to raise money on them in order to make certain payments on the signer's behalf. The agent, without receiving such instructions, filled up the notes, and, having discounted them with the plaintiff, who *bona fide* gave value for them, misappropriated the funds.

It was held that the defendant was not liable on the notes since he had not delivered them for purposes of conversion into promissory notes and negotiation; he had entrusted the blank signed forms to his agent *as a custodian only* and not with the intention that he should fill them up and raise money on them without further instructions. The signer was therefore not estopped from denying liability on the instruments.

Difficulty is sometimes experienced in agreeing the foregoing implications of s. 20 with the proviso to s. 21 (2), *viz.*, "But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed". The difference is in the fact that an inchoate instrument, as visualized in s. 20, *is not a bill*, and it does



not become a bill by being fraudulently completed because the fraud is of no effect whatsoever. Delivery of such an instrument is not delivery of a *bill* within the meaning of s. 21 (2) ; but delivery of an inchoate instrument with the express intention that it shall be converted into a bill and its subsequent completion as a bill constitute delivery under s. 21 (2) sufficient to preserve the rights of a holder in due course, who, as provided by s. 20 (2), is not prejudiced if the completion is not as originally intended by the drawer.

Thus, in *Carter v. White*, 1883, A, in payment of a debt, gave B a blank acceptance of a bill for the amount of the debt. A died, and B completed the bill by inserting his name as drawer and payee. It was held that B *could prove* against the estate of A for the amount of the bill, as it was signed and delivered to him with the *express object that it should be duly completed*.

A second important point is that, unless there is a limitation on the holder's authority, he can complete the bill to the extent that the stamp will cover ; but if the amount exceeds that which is covered by the stamp, then no action can be taken on the instrument, since an insufficiently stamped bill is invalid and unenforceable. [Stamp Act, 1891, s. 38 (1)—see Chapter 23.]

Where the delivery of an instrument for completion is subject to any limitation of authority of the holder to complete it, then, in order to make liable a party who became a party *prior to* completion, it is necessary to show that the limitations have been satisfied and that the instrument was completed in accordance with the authority given. But if an instrument has been *delivered for purposes of completion* and negotiation and, after being completed, gets into the hands of a holder in due course, such a holder obtains an *absolute* title and can sue on the bill even though the authority for completion has been exceeded, or even though the bill was not completed within a reasonable time.

Even if the holder cannot hold the drawer liable because there has been no delivery by the drawer for purposes of completion, the holder can proceed against the person completing the instrument as well as any person who signed it *after* completion.

### Effect of Material Alteration

Any material alteration in a bill without the consent of all the parties will invalidate the bill as against any party who has not consented to the alteration. The Act does not define "material alteration", but it may be taken to be one that "in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial".<sup>1</sup>

<sup>1</sup> Chalmers, *Bills of Exchange*, 10th Edn., p. 256.

64. (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

Provided that :—

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Examples of alterations held to be material are : (a) the alteration of the rate of interest specified in a bill, as from 3 per cent. to  $2\frac{1}{2}$  per cent. ; (b) the alteration of the words "with lawful interest" to "with interest at 6 per cent." ; (c) the conversion of a bill payable three months after date to a bill payable three months after sight ; (d) the indorsement of a particular rate of exchange on a bill which does not provide on the face of it that this shall be done ; (e) the addition of a place of payment without the acceptor's consent ; (f) the alteration of the place of payment and (g) the alteration of the place where the bill was drawn, so as to convert a foreign bill into an inland bill.

If any such alteration is not apparent, a holder in due course can sue on the bill according to its original tenor, *e.g.*, for the amount for which it was originally drawn. Thus, in *Scholfield v. Londesborough*, 1896, a bill was drawn for £500 with a stamp sufficient to cover £4,000 and with vacant spaces before the amount in both the words and figures. After the acceptor had signed his acceptance he handed the bill to the drawer, who fraudulently altered the amounts in words and figures to £3,500. It was held that a holder in due course could recover from the acceptor the amount for which the bill was originally drawn ; *i.e.*, £500.

### Fraudulent Completion distinguished from Material Alteration

Material alteration of a bill which was already completed, as dealt with by s. 64, must be distinguished from fraudulent completion of an inchoate instrument, as dealt with by s. 20.

In the case of fraudulent completion, a holder in due course has a right to enforce the instrument as completed against any party who took it subsequent to the completion and also against the original signer, unless the latter can prove no delivery for the purpose of completion (s. 20).

But when there is fraudulent non-apparent alteration, a holder in due course can enforce payment of the bill against prior parties only *according to its original tenor*, though he can recover the full amount (as altered) from any party who made, authorised or assented to the alteration, or from any person who became a party subsequent to the alteration. This distinction is brought out in the following case, which should be compared with *Scholfield v. Londesbrough* quoted above.

In *Garrard v. Lewis*, 1882, A signed an acceptance in which the amount in words was not stated, but whereon the figures £14 0s. 6d. were given in the margin. The drawer fraudulently filled up the bill for £164 0s. 6d. and altered the figures to correspond. It was held that the alteration of the figures did *not* constitute a material alteration of the bill, but that the circumstances involved fraudulent *completion*, so that a holder in due course was entitled under s. 20 to recover from A the full amount of the bill as completed, and A could not plead material alteration under s. 64.

### Transfer or Negotiation of a Bill

31. (1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

S. 31 (2) indicates that a bill originally or by indorsement payable to *bearer* is in a deliverable state as it stands, and the transferor cannot be compelled to endorse it; but indorsement of a bill payable to *order* is essential to put it in a deliverable condition.

### Transfer without Indorsement

Although a bill payable to the transferor's *order* cannot be negotiated unless it is indorsed *before delivery*, such a bill may be transferred by the holder without being signed by him with effect, as defined by s. 31 (4):—

31. (4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

Suppose a bill payable to Robinson or order is delivered by Robinson to Brown without indorsement. Brown is not a *holder* within the meaning of the Act; he is merely an *equitable assignee* of a chose in action. He cannot sue on the bill in his own name, or negotiate it, but must join Robinson with him in any action on

the bill against any parties prior to Robinson. Brown may, however, bring an action against Robinson to compel him to indorse the bill, and Brown then becomes a holder and can sue in his own name.

Again, if X, the holder of a bill payable to his order, transfers it to Y without indorsement, and thereafter dies, the Court may order X's executors or administrators to indorse the bill in favour of Y. Similarly, if X becomes bankrupt, his trustee can be compelled to indorse.

Negotiation of a bill in such circumstances dates from the time when the transferor or his representative actually indorsed the bill, so that if, in the first example, Brown had received notice of a defect in Robinson's title before Robinson had indorsed the instrument, then he (Brown) would be bound by such notice and could not sue as a holder in due course.

### Legal Transmission of a Bill

The Act deals only with the transfer of a bill by negotiation, and does not touch the principles of general law by virtue of which the title to a bill may be *transmitted* from one person to another as a chose in action or chattel.

Thus, on the death or bankruptcy of the holder of a bill, the title passes to his personal representatives or the trustee in bankruptcy, as the case may be; and such representatives may have to indorse the bill personally. The person so indorsing is personally liable unless his indorsement in its terms intimates that he signs in a representative capacity, in which case s. 31 (5) provides that :—

31. (5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Examples of such indorsements are given in Chapter 14.

### Assignment of the Property in a Bill

Since a bill is a chose in action, it may be the subject of a valid equitable or legal assignment by one person to another. So, if the holder of a bill payable to his order transfers it without indorsement for value, the transfer will operate as an *equitable assignment*, and the transferee will obtain such title to the bill as was possessed by the transferor. Again, the holder may execute a *legal assignment* of the bill, in which event the assignee can sue in his own name, but his rights will be subject to any defence or set-off that prior parties may have against the assignor. Moreover, if the assignor does not give up the bill to the assignee, but, subsequent to the assignment, transfers it to a holder in due course, the latter's rights will prevail as against the assignee.

In one case, X assigned to A certain property including a bill payable to bearer, but subsequently transferred the bill for value to B, who had no notice of the prior assignment. B, as a holder in due course, obtained the legal title to the bill, and his right thereto was unaffected by A's claim as assignee.

A bill or promissory note may be the subject of a *donatio mortis causâ*, i.e., a gift made by a person in contemplation of and subject to his death. Thus, if Brown in contemplation of death hands a bearer bill to Jones, with the intention that the property in the bill shall pass to Jones on his (Brown's) death, the property passes on that event *but not before*. Jones could claim the bill even if it were payable to Brown's order but had not been indorsed by him before death, though Jones may have to prove his title to the instrument.

### When a Bill may be Re-issued

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Thus, if a bill payable at a future date is indorsed over by the holder to the drawer or acceptor, or to a prior indorser, such drawer, acceptor or prior indorser may at any time before maturity re-issue the bill and indorse it away. For example, if A draws on B in favour of a payee C a bill that is negotiated to D, E, and F in turn, and F negotiates the bill by indorsement back to indorser C, C will retain his rights against A and B, but will have no right of action against D, E and F. This principle is known as the *rule against circuity of action*.

### Negotiation of Overdue Bills

In general, a bill continues to be negotiable until paid at maturity by the principal debtor or party primarily liable, but s. 36 (1) specifies two conditions under which the negotiability of a bill is destroyed :—

36. (1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed, or (b) discharged by payment or otherwise.

Reference should be made to ss. 59–64 and 68 as to discharge, and to s. 35 as to restrictive indorsements (e.g., "Pay F only").

In regard to the negotiation of an overdue bill, s. 36 (2) provides :—

36. (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

By virtue of this sub-section, as also by s. 29 (1a), a person who takes a bill when it is overdue cannot be a holder in due course, and the title of such a person is affected by any defect in the title of previous holders existing at the due date of the bill. This is because the fact that the bill is overdue should in itself arouse suspicion in the mind of a transferee, for he takes a bill which on the face of it ought already to have been paid.

The fact that a bill is overdue does not of itself *create* a defect in the title to the bill, if it is otherwise valid; the defect must *already exist* at maturity if it is to affect persons taking the bill after that time. So, if a bill is drawn to A's order in respect of an illegal consideration, and B takes it by indorsement from A *when overdue*, B cannot recover from the drawer. But where the drawer of a bill, accepted for an illegal consideration, indorses it before the due date to A, who takes it as a holder in due course and indorses it when overdue to B for value, B can sue all the parties, since his transferor A had a good title.

The term "defect of title", used in the sub-section, is explained in s. 29 (2). It does not include set-off or counterclaim. Hence, a person who takes an overdue bill for value is not affected by the fact that a prior party whom he seeks to hold liable has, for example, a right of set-off against the party from whom he received the bill, as the set-off does not constitute defect of title. Again, the fact that a bill is accepted by A for the drawer's accommodation does not prevent the holder X from proceeding against A, as the absence of consideration between A and the drawer is not a defect of title as against X.

The meaning of "overdue" as applied to a bill payable otherwise than on demand, is defined in s. 14, which provides that such a bill is not overdue until after the expiration of the last day of grace. As to bills payable *on demand* (including cheques), s. 36 (3) provides that:—

36. (3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

This provision is considered in reference to cheques in Chapter 13.

As the date upon which a bill is indorsed does not as a rule appear thereon, it has usually to be determined from the circumstances in each case. But by s. 36 (4):—

36. (4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

## Negotiation after Dishonour

36. (5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

The transferee of a dishonoured bill who has notice of the dishonour is in much the same position as the transferee of an overdue bill. But the transferee of a dishonoured bill who does not know of the dishonour *may* be a holder in due course ; whereas a person who takes an overdue bill cannot in any circumstances be a holder in due course.

## Rights and Powers of the Holder

38. The rights and powers of the holder of a bill are as follows :—

(1) He may sue on the bill in his own name :

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill :

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

This section expressly or impliedly gives the holder a right (a) to sue on the bill in his own name ; (b) to hold or retain the bill, if he is a holder in due course, as against any prior parties ; (c) to negotiate the bill ; (d) to give the person paying the bill in due course a valid discharge. In addition, a holder has a right, in certain circumstances, which are explained elsewhere, (e) if he so desires, to present a bill for acceptance and payment, where such presentment is excused ; (f) to note or protest a bill on dishonour by non-acceptance or non-payment, and to recover from prior parties the expenses incurred ; (g) to insert additional matter on a bill, e.g., the true date of issue if the bill is undated, or the true date of acceptance if the acceptance of a bill payable after sight is undated, or to convert an indorsement in blank into a special indorsement.

## The Holder's Right to Sue

If a bill is payable to a person or persons, or to his or their order, any action on the instrument must be brought in the name or names of such person(s). Consequently, if a bill is payable to Brown & Co., it is not sufficient that an action be brought in the name of one of the partners or of the principal or managing partner. On the other hand, if the bill is payable to bearer, action may be brought in the name of any person who is in actual or constructive

possession of the instrument, either alone or jointly with another or others. Thus, if Brown is the holder of a bill and indorses it in blank to a banker for collection, either Brown or the banker may take proceedings against the acceptor for the amount of the bill.

In regard to s. 38 (2), if the acceptor of a bill has a valid set-off or counterclaim as against the payee, the latter cannot demand payment of the bill, but this would not prevent a holder in due course from enforcing full payment of the instrument as against the acceptor. In other words, a holder in due course as compared with a mere holder has the additional benefit that his title is not subject to equities and is entirely free from personal defences of prior parties. The expression *personal defences* refers to such defences as set-off and counterclaim.

The right to sue on a bill must be distinguished from the power to recover thereon. Although any valid holder has a right to sue, i.e., take action at law, on the instrument, his power to recover or to succeed in his action will depend upon his title.

### Remedy in Respect of Lost Bills

A holder who has lost a bill is afforded relief by ss. 69 and 70. By s. 69 :—

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

The Act does not indicate the nature of the security to be given to the drawer, but it is presumed that it must be real and not imaginary. It is only the *drawer* who can be compelled to issue a duplicate, and the holder cannot compel the acceptor or any indorsers to sign the duplicate.

*Action on a Lost Bill.*—S. 70 provides that the remedies of the holder against the acceptor, drawer or indorsers shall not be prejudiced by reason of the loss of the instrument :—

70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

As a rule, the plaintiff deposits the indemnity with the Court before the action is brought, since failure to do so might debar the plaintiff's right to claim costs.

The loss of a bill does not excuse presentment for payment or the giving of notice of dishonour, and s. 51 (8) requires protest to be made on a copy of the bill if the original is lost or mislaid. (See Chapter 19.)



## CHAPTER 13

### CHEQUES

A CHEQUE is defined by s. 73 as "a bill of exchange drawn on a banker, payable on demand", and the same section decrees that, except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque.

In view of these provisions, a complete legal definition of a cheque can be obtained by combining the above definition with the definition of a bill (see page 73) thus :—

1. A cheque is an unconditional order in writing, addressed by one person to another, who must be a banker, signed by the person giving it, requiring the banker to whom it is addressed to pay on demand a sum certain in money to or to the order of a specified person, or to bearer.

2. An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a cheque.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section ; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the banker is to reimburse himself, or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the cheque, is unconditional.

4. A cheque is not invalid by reason :—

(a) That it is not dated ; (b) That it does not specify the value given, or that any value has been given therefor ; (c) That it does not specify the place where it is drawn or the place where it is payable.

From the foregoing adapted definition, it will be seen that a cheque must comply with seven essential requisites : (a) be *unconditional* ; (b) be *in writing* ; (c) be addressed by *one person* to another, who must be a banker ; (d) be *signed* by the person giving it ; (e) require payment to be made *on demand* ; (f) order payment of a *sum certain* in money ; (g) order payment *to order or to bearer*.

#### The Parties to a Cheque

The issue of a cheque concerns three persons : (a) *the drawer*, i.e., the person who addresses the order to the banker, and by whom or in whose name the instrument is signed ; (b) *the drawee*, i.e., the banker to whom the order is addressed ; (c) *the payee*, i.e., the person to whom or to whose order the drawer wishes the money to be paid.

In the specimen given below, *Thomas Robinson* is the drawer, *The Northern Bank* is the drawee, and *James Brown* is the payee. As the provisions of the Act relative to bills apply generally to

No. 792630.

NORTHTOWN, 1st September, 19...

THE NORTHERN BANK, LIMITED,  
Northtown.

Pay Mr James Brown ..... or Order

One hundred pounds .....

£100 : 0 : 0d.

STAMP  
2d.

THOMAS ROBINSON.

cheques, the rights and liabilities of the drawer, drawee, and indorser of a cheque are technically comparable with those of the drawer, drawee, and indorser of a bill payable upon demand. There are, however, certain important differences, which arise from the fact that a cheque is never accepted. Whereas the holder of a demand bill which has been accepted can proceed against the acceptor as well as the drawer, the holder of a cheque can proceed only against the drawer; the drawee of a cheque is never liable on the instrument to the holder. The drawer of a cheque is the party ultimately liable, whereas the drawer of an accepted bill payable on demand is liable only if the acceptor does not pay.

### The Order to the Bank must be Unconditional

The cheque must be an *unconditional* order to pay. If the drawer imposes any condition upon the drawee banker, *e.g.*, by stating in the instrument that it is to be paid only on condition that a receipt on the instrument is duly completed by the payee, then it is not a cheque. But the drawer may impose a condition on the payee, *e.g.*, by requiring on the face of the cheque that an attached receipt is to be duly signed and stamped before *presentment* for payment. It is only the *order to pay* that must be unconditional to comply with the definition.

A cheque is not invalid merely because it bears on its face an indication of the account to be debited, *e.g.*, "No. 1 Account" or "White Lion Account", or because it bears some indication of the transaction it is intended to settle, *e.g.*, "Pay John Brown (Rent of 17 Northend Road) or order".

### "Writing" is Essential

A cheque must be *in writing*, which legally includes writing in ink, or lead-pencil, or print (see s. 2), or typewriting, or writing by any other mechanical process.

Nevertheless, the use of ordinary lead-pencil is discouraged by bankers, because writing in lead-pencil can so easily be altered or may become indecipherable. Hence, cheques drawn in lead-pencil are usually returned to the drawer for confirmation, though cheques completed with a *copying* or *indelible* pencil are paid without question.

### “ Addressed by One Person to Another (a Banker) ”

The order to pay embodied in a cheque must be addressed by one person to another, who must be a *banker*. *Person*, as provided by s. 2, “ includes a body of persons whether incorporated or not ”, *i.e.*, it includes one or more individuals, or a corporation sole or aggregate. But in all cases the drawer and the drawee must be *distinct* legal persons, so that a draft drawn by a bank branch on its head office, or *vice versa*, is not a cheque, for head office and branch of the same bank are for this purpose legally regarded as one entity. (See Chapter 22.)

### A Cheque must be Signed by the Drawer

The cheque must be signed by the person giving it, *i.e.*, the drawer. But the signature may be written by the drawer himself or by any person acting under his authority, so long as an agent so signing clearly indicates that he signs for the named drawer in a representative capacity, and so excludes his *personal* liability.

The signature need not be the actual name of the drawer, but may be a trade or assumed name or the name of a partnership (s. 23). A person cannot, except in rare circumstances, be held liable in respect of his signature on a cheque if the signature has been forged or written thereon without his authority. (See p. 93.)

Bankers will not, in the absence of a special agreement and indemnity, pay cheques on which the drawer's signature is wholly impressed by a rubber or metal stamp, for it is impossible to ensure that such a signature was impressed by the drawer himself or by his authority.

### Meaning of “ Payment on Demand ”

10. (1) A bill is payable on demand—

- (a) Which is expressed to be payable on demand, or at sight, or on presentation ; or
- (b) In which no time for payment is expressed.

In general, cheques are drawn “ Pay Thomas Brown or order ”, no time for payment being expressed. It is not certain whether an

instrument providing that presentment shall be made within a prescribed period or before a specified date, or making payment conditional upon the completion of an attached receipt, is payable on demand within the meaning of this section.

### **The Order must be for "A Sum Certain in Money"**

As in the case of a bill, the sum payable by a cheque is a *sum certain in money*, even though it is required to be paid: (a) with interest; (b) according to an indicated rate of exchange; or (c) according to a rate of exchange to be ascertained as directed by the cheque (s. 9).

Although a cheque would presumably be valid if drawn payable by instalments (s. 9), bankers would not pay such an instrument, as it is impracticable to do so.

As a rule, the amount of a cheque is stated in both words and figures, but where there is a discrepancy between the two, the sum denoted by *words* is the amount payable [s. 9 (2)].

Bankers usually pay cheques bearing the amount in words only, but return cheques bearing the amount in figures only, with answer "Amount required in words". Such a cheque should not be paid on re-presentment unless it appears to have been properly completed by the *drawer* or unless an indemnity is given by the collecting banker.

If the amount given in words differs from that given in figures, the cheque should be returned marked, "Words and figures differ", though some bankers will pay the amount in words if it is less than the amount given in figures.

Mistakes in specifying the amount to be paid are frequently made by customers in drawing cheques, but payment should not be refused if the drawer's intention is plain on the face of the instrument. Thus the omission of some or all of the words "pounds", "shillings" and "pence" is not sufficient to justify the return of a cheque if the amount in words agrees with the amount in figures, so that a cheque reading "twenty-five 1/6d.", or "twenty-five one shilling and sixpence" may be paid if the amount in figures is "£25. 1s. 6d."

### **Payment must be "to Order" or "to Bearer"**

From s. 7 (p. 80), it will be seen that, if a cheque is not payable to bearer and no payee is indicated, the banker is entitled to return it marked "Payee's name required", although it is usual to regard a cheque drawn "Pay.....or order" as being payable to the order of the drawer and to require his indorsement as a discharge.

A cheque payable to bearer usually runs simply, "Pay.....bearer", or it may be drawn "Pay Thomas Robinson or bearer".

Open cheques so drawn may safely be paid to anyone presenting them for encashment and no indorsement is necessary. Sometimes the words "or order" printed on the face of the cheque are deleted, and the words "or bearer" substituted. If such an alteration is not confirmed by the signature or initials of the drawer, the cheque should be returned marked "Alteration requires drawer's confirmation".

A cheque may be made payable to two or more payees *jointly*, e.g., "Pay John Brown *and* Thomas Robinson"; or to alternative payees, e.g., "Pay John Brown *or* Thomas Robinson"; or to the holder of an office for the time being, e.g., "Pay the Town Clerk, Bedford, or order", in which case the cheque requires indorsement by the holder of that office for the time being.

### The Date of a Cheque

The date on a cheque is not essential to its validity for, by s. 3 (4a), a bill (including a cheque) is not invalid merely because the date is omitted.

Bankers usually return for completion cheques that do not bear a date, although, by virtue of s. 20, any person in possession of a cheque that is wanting in any material particular, including presumably the drawee banker, has a *prima facie* authority to fill up the omission in any way he thinks fit, subject to any limitations of authority given by the drawer.

### Overdue Cheques

Although a date is not essential to the validity of a cheque, the date is important to a holder in certain circumstances, for, by s. 36 (3), a cheque becomes overdue for purposes of negotiation when it appears on the face of it to have been in circulation *an unreasonable length of time*—a question of fact to be determined by the circumstances of each case. If a cheque is negotiated after the lapse of a reasonable length of time, the holder takes it *subject to equities, i.e.*, subject to any defects in the title of the person from whom he received it.

In the absence of special circumstances, a cheque would probably be regarded as having been in circulation an unreasonable length of time from the point of view of its *negotiability* after the lapse of about ten days from its date of issue.

This view was confirmed in a case in which the plaintiff, a licensed victualler, gave £15 on account to a man named Brown for a cheque for £50 payable to Brown's order and dated *twelve* days previously. On presentation the cheque was dishonoured, and Brown, who had obtained it under false pretences, disappeared. The Judge held that the cheque was overdue when the plaintiff cashed it, and that it should have excited suspicion, as it had been in Brown's

possession for thirteen days, although he told the plaintiff that he wanted money. The plaintiff could not, therefore, recover from the drawer.

### Liability of Parties on Overdue Cheques

Though a cheque may be overdue for purposes of *negotiation*, it is not necessarily stale from the point of view of *payment* by the banker. And because a cheque is stale for purposes of negotiation or payment, the drawer or an indorser is not necessarily freed from his liability on the instrument.

The law governing the presentment of bills on demand in general is thus stated by s. 45 (2) :—

45. (2) Where the bill is payable on demand, then, *subject to the provisions of this Act*, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

The words in italics are important. The provisions referred to are those in s. 46 (1), which defines the circumstances in which presentment for payment is excused, and in s. 74, which provides in effect that the drawer of a cheque is not as completely freed from liability by delay in presentment as is the drawer of an ordinary bill of exchange payable on demand, *viz* :—

74. Subject to the provisions of this Act—

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker at the time when such discharge takes effect, *but not to a larger amount than he would have been had such cheque been paid.*

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of the banker to the extent of such discharge, and entitled to recover the amount from him.

From the above it is marked : by s. 45, the drawer of a bill on demand (other than a cheque) and an indorser of any bill on demand, are both discharged to the order by delay in presentment for payment (unless such discharge is excused under s. 46), the effect of s. 74 is that the

A cheque payable is not discharged by delay in presentment by the bearer, or it is not of any damage he suffers through the delay.

In the case of *King and Boyd v. Porter*, 1925, a cheque for £150 was mislaid for a period of three years. On being discovered, it was presented for payment by the plaintiffs (who were indorsees) and was dishonoured. The Court of Appeal for Northern Ireland held that, so far as the drawer's liability was concerned, the effect of s. 74 was to take cheques out of the operation of s. 45, and that, so long as the drawer had suffered no actual damage through the delay in presentment, he was not discharged.

The right of action on a simple contract debt, including a cheque or bill, is not barred for six years, which period begins to run in the case of a cheque from its date, or from its date of issue, whichever is the later. It follows that, although a banker will not pay a cheque which is over six or twelve months old, the holder may enforce payment thereof against the drawer at any time within six years of the date or date of issue of the cheque; and will succeed except to the extent to which the *drawer has suffered damage by the delay in demanding payment.*

The drawer would be prejudiced, and the holder could not succeed against him, if the drawer had had sufficient funds at the bank to meet the cheque, but before the presentment and after the expiration of a reasonable time, the bank had failed. In such a case, the holder could only prove in the winding-up of the bank, for if he were allowed to succeed against the drawer for the full amount, the latter would lose more by the delay in presenting the cheque than he would have done if it had been presented and paid within a reasonable time of its issue. Moreover, if the drawer had *no funds* to his credit, but was authorized to overdraw, the drawer would still be discharged; but the holder could not prove against the banker's estate.

### What is a Crossed Cheque ?

76. (1) Where a cheque bears across its face an addition of—

- (a) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or
- (b) Two parallel transverse lines simply, either with or without the words "not negotiable";

that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

The two parallel transverse lines that constitute a *general* crossing may be written, printed, or perforated across the face of the cheque.





## SPECIAL CROSSINGS

Northern Bank, Ltd.,  
Northtown.

Northern Bank, Ltd.

Northern Bank, Ltd.,  
Northtown.

Northern Bank, Ltd.  
Not Negotiable.

Northern Bank, Ltd.  
A/c Payee only.

Northern Bank, Ltd.,  
Northtown.  
Remitted for collection  
to Lloyds Bank, Ltd.

Northern Bank, Ltd.,  
Northtown.  
A/c Northtown U.D.C.

## Cheques that are not Transferable

A cheque crossed "Not negotiable" must be distinguished from one that is not transferable in its origin or by indorsement because of the insertion of words prohibiting transfer or indicating an intention that it shall not be transferable [s. 8 (1)], e.g., a cheque drawn payable to "Thomas Robinson *only*".

A cheque crossed "Not negotiable" can be paid even though it bears evidence of having been transferred, subject to the fact, that, if there is any defect in the title of one of the holders, then that holder and subsequent holders will be liable to recoup the true owner. But a "Not transferable" cheque must be paid only to the specified payee. Should such a cheque, bearing evidence of having been transferred, be collected or paid by a banker, the collecting banker will render himself liable for negligence if it be shown that his customer had a defective title, and the paying banker for disobeying the mandate of the drawer.

## Effect of a Crossing

Unless the words "Not negotiable" are added, a general or special crossing has no effect whatsoever upon the full negotiability of a cheque: it merely restricts the manner in which the cheque is to be collected and paid. The general effect, so far as concerns the paying banker, is that he must not pay the cheque *except to another banker*, and, if a banker is named in the crossing, then only to the banker named.

If a crossed cheque is paid over the counter to anyone other than a banker, the banker paying it will be liable to the true owner of the instrument in the event of the funds being paid to a wrongful holder.

Accordingly, anyone crossing a cheque is assured that, if it is lost or stolen, it cannot be paid by a banker otherwise than in accordance with the crossing without his running the risk of having to pay the money again to the true owner. The addition of the words "Not negotiable" is an added safeguard, for anyone who

takes a cheque so marked takes it at his own risk, and no title to the instrument can be obtained by or through any holder who is not entitled to it.

The effect of a crossing applies equally to a *bearer* as to an order cheque, so that a bearer cheque crossed "Not negotiable" loses its full negotiability. The fact that a crossed cheque is payable to bearer merely dispenses with the necessity for indorsement.

## Power to Cross a Cheque

77. (1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally, the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable".

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

78. A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

In accordance with the provisions of s. 77 (3 and 5), every banker in practice makes a point of crossing either to himself or to another banker for collection all cheques paid in for collection, so as to ensure that the proceeds of the cheques will be paid to the banker named in the crossing and to no other.

As a crossing is a material part of a cheque, it cannot be altered otherwise than is sanctioned by s. 77. Hence, a banker should not pay any cheque on which the crossing (including, of course, the words "Not negotiable") has been materially altered or obliterated.

## "Opening" a Crossing

The drawer may cancel or neutralize or, as it is technically termed, "open" the crossing on a cheque, by writing the words "Pay cash" or "Please pay cash" across the top of the cheque alongside the crossing, and adding his signature under the words. Cancellation is often done when a crossing is originally *printed* on the cheque, so as to enable the drawer or the payee (who possibly has no banking account) to obtain cash over the counter.

The practice is not sanctioned by the Act, and, although it has received some recognition by the Courts, it should be strongly discouraged because of the risk to the paying banker that the initials or the signature of the drawer have been forged by some person who has found or stolen the instrument. If a cheque of this description is presented for encashment by the drawer himself, or

a payee who is well known to the banker, the risk is slight, but a banker would undoubtedly be liable to the true owner of the instrument, and unable to debit his customer, if the cancelling signature or initials of the drawer proved to be forged.

For these reasons, bankers insist that no opening of a crossing will be recognized by them unless the alteration is accompanied by the full signature of the drawer, and then only if the cheque is presented for encashment by the drawer himself or by his known agent.

### Inchoate or Incomplete Cheques

By virtue of s. 20, the person to whom an inchoate cheque is handed by the drawer for completion has *prima facie* authority to complete it in respect of the date, name of the payee and amount; and, if the completion is effected in a reasonable time and strictly in accordance with the authority given at the time of issue, the drawer cannot thereafter object. Nevertheless, if a cheque wanting in some material particular is presented for payment by anyone other than the drawer, the paying banker should not permit the holder to insert the missing details, but, in the interests of himself and of the drawer, should return the cheque with an answer indicating that certain essentials are absent.

If an inchoate document, subsequently completed as a cheque, is to be valid, it *must* (by s. 20) *be delivered by the signer in order that it may be converted into a cheque*, and it must also be "filled up within a reasonable time, and strictly in accordance with the authority given". Nevertheless, s. 20 further provides that, if an instrument *which has been delivered* for the purpose of completion comes after completion into the hands of a holder in due course, it will be valid and effectual in his hands even though it has not been completed in conformity with these provisions.

The drawer of a cheque therefore runs considerable risk if he issues a signed cheque without filling in the amount and the payee's name, for, if a larger amount is filled in and the cheque is subsequently presented for payment by a *holder in due course*, the latter may be in a position to enforce payment.

But payment can be enforced only by a holder in due course, or anyone claiming through him. Thus in *Paine v. Bevan and Bevan*, 1914, a person signed a blank cheque and handed it to a clerk to fill in the name of the payee. The clerk filled in the name of another person who did not give value, but obtained payment of the cheque. It was held that the drawer was *not estopped* as against the payee (who, not having given value, was not a holder in due course) from saying that it was wrongly filled up as regards the payee's name, and was therefore entitled to recover from him.

To avoid difficulties of this kind, and also to provide against material alterations of the amount such as are discussed below, cheques handed to an agent or employee for completion are sometimes stamped across the face with words such as "Under ten pounds", or "Not over twenty pounds". Although such words have no statutory significance, a banker who paid more than the sum specified would probably be unable to debit his customer.

### Effect of Material Alteration

By ss. 64 and 78, any alteration of the date, sum payable, place of payment or crossing on the face of a cheque is *material*, and, unless the alteration is made with the drawer's consent (as indicated, for example, by his signature or initials), the cheque cannot be debited to his account, since the alteration renders the cheque void except as against the party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

This general rule is subject to three exceptions : (a) that a holder in due course can enforce payment according to its original tenor of a cheque that bears a *non-apparent* alteration ; (b) that the crossing on a cheque can be added to by a holder and by a collecting banker in accordance with the provisions of s. 77 ; and (c) that the drawer of a cheque, the amount of which has been fraudulently altered, may not be able to refuse to be debited therewith if he has carelessly facilitated the alteration. (See Chapter 15.)

The effect of these provisions was illustrated in a case when a person who claimed to have a banking account in the country drew a cheque for a small sum and obtained the indorsement of a friend in London to enable him to cash the cheque at the indorser's London bank. Having obtained his friend's indorsement, the drawer raised the amount of the cheque, signed the alteration, and obtained cash for the larger amount from the London bank, which relied on its customer's indorsement. The cheque was subsequently returned with the answer "Account Closed", by which time the drawer had disappeared.

The cashing bank sought to recover the amount of the cheque from the indorser, but he repudiated liability for any amount exceeding the original sum drawn. Legally, he was not liable even for this sum for, by s. 64, the material alteration of the cheque discharged him from liability ; and as the alteration was apparent, the bank could not rely on the proviso to s. 64, which entitles a holder in due course to enforce payment according to an altered instrument's original tenor *only if the alteration is not apparent*.

A banker paying a cheque should see that any alteration thereon is confirmed by the initials or preferably the signature of the drawer. When a cheque is signed by more than one person, or on behalf of

a limited company, partnership or other body, any material alteration should be confirmed by the initials or signatures of *all* the persons signing. Alterations on cheques signed by *two* parties to a joint account should be duly initialled or signed by *both* parties *unless* either party has authority to sign cheques alone, in which case the initials or signature of either will suffice and that person need not be the party who originally signed. Similarly, where any two directors have power to sign cheques on behalf of a company, an alteration may be confirmed by the initials or signatures of any two directors and not necessarily those who originally signed.

A banker should not accept the initials or signature of a secretary alone in confirmation of an alteration on a company's cheques, unless the secretary alone has power to issue and sign cheques for the company, which would be uncommon.

Cheques drawn "or order" are frequently altered to "or bearer", and so made transferable by delivery without indorsement. This alteration is permissible only if made by the drawer, and should be confirmed by his initials or signature (or by the initials and signatures of all the drawers, if there are more than one). On the other hand, the payee or indorsee of a cheque may alter the words "or bearer" to "or order", or cross out the words "or bearer" if they appear, thereby making the instrument payable to order. This latter alteration, although not covered by the Act, is sanctioned by custom.

Examples of unusual material alterations sufficient to affect the validity of a cheque if made without the drawer's consent are the deletion of the words "Not negotiable" forming part of a crossing (s. 78), and the alteration of the name of the branch on which the cheque is drawn [s. 64 (2)].

### Cancellation of a Cheque

By s. 63 (see Chapter 20), a cheque is discharged when it is intentionally cancelled by the holder or his agent, in which case any party liable on the cheque is entirely freed from liability. Cancellation may be effected by cancelling the drawer's signature, by totally destroying the cheque, by tearing it up, or by marking it clearly in some way across the face with the intention that it shall thereafter be regarded as cancelled. In practice, banks cancel paid cheques by crossing out the drawer's signature and usually also by stamping the word "Paid" across the face.

When cancellation is made intentionally by the holder, the drawer and any indorsers prior to the holder are discharged, but, by s. 63, a cancellation is inoperative if it is made unintentionally, or by mistake, or without the authority of the holder. If, for example, a bank cashier by mistake cancels the signature of the

drawer of a cheque, the cheque is not discharged, and the cancellation may be annulled by the cashier's writing on the cheque some such words as "Cancelled in error at Northtown branch, J. R. Thomson, Cashier."

### Mutilation of a Cheque

A cheque is mutilated when it bears evidence of having been torn or when some part of it is missing. Mutilation of this kind may be accidental, or it may indicate that it had been the intention of the drawer or of the holder to cancel or annul the cheque, but that the pieces had thereafter been fraudulently appropriated, pasted together and negotiated or presented for payment. A banker to whom a mutilated cheque is presented should, therefore, refuse payment unless the mutilation is confirmed by the signature or initials of the drawer, or by the signature of the collecting banker. Mutilated cheques not so confirmed should be returned with the answer "Mutilation requires confirmation" or simply "Cheque mutilated".

### Payment of Debts by Cheque

There is no obligation on the part of a creditor to accept payment by cheque; he is free to refuse a cheque and to demand payment in legal tender. If he accepts a cheque without demur, he will be presumed to have accepted the instrument as conditional payment of what is due to him.

This means that, unless there are circumstances showing that a cheque is accepted unconditionally in final discharge of a debt, the debt is revived if the cheque is not honoured when presented to the drawee banker; but, until presentment has been made and payment has been refused, the creditor has no right to sue the debtor for the money due.

As already stated (see p. 127), the holder of a cheque retains his right of action on the instrument until six years from its original date or from the date of issue, but neglect on his part to obtain payment within a reasonable time will completely discharge an indorser (s. 45), and will also discharge the drawer to the extent of any damage suffered by the drawer through the delay (s. 74).

The obligation of a debtor from whom a cheque has been taken in payment may be discharged even though the money has not been received by the creditor, if the cheque is lost or misappropriated or is paid to the creditor's agent, and is paid in due course of business either to someone other than the creditor or to a person entitled to present and receive it in due course of business. If a cheque on which the indorser is liable is lost or is paid to the debtor, with the right, in both cases, to demand payment to the drawee banker, clearly, the

drawer, having thus paid once, cannot be called upon by his creditor to pay a second time, and in such circumstances the remedy of the creditor is against the finder or thief who has wrongly obtained payment of the instrument.

### Payment by Cheque through the Post

The general rule of law is that, as between the sender and the addressee, any loss that arises from sending a cheque by post will fall upon the person *who first makes the Post Office his agent* for the purposes of the payment. In the majority of cases, the Post Office is the agent of the *sender*, for it is he who usually decides to pay in this way. When such is the case, the sender must bear any loss that ensues if the cheque is lost or stolen before it reaches the addressee.

On the other hand, there may be circumstances which make the Post Office the agent of the *creditor*, *i.e.*, the person to receive the money, as where he expressly or impliedly requests that payment shall be made by cheque forwarded to him by post. In such a case, delivery of the cheque to the Post Office by the sender is regarded as delivery to the agent of the creditor, so the creditor must bear any loss that arises during the time when the cheque is in the hands of the Post Office.

Even then, the creditor may not have to bear the loss if the method of payment adopted by the sender differs in any material way from that prescribed by the creditor. Thus, if the creditor asks for a crossed cheque to be sent to him by post, but the debtor sends an *uncrossed* cheque, or sends the cheque by hand instead of by post, then the debtor will probably have to stand any loss that arises, *e.g.*, if the cheque is stolen and in due course paid by the drawee banker.

Every such case has to be decided according to its particular circumstances, and the mere fact that payments have regularly been made through the post over a period of years does not imply that the creditor has authorized future payments to be made in that way (*Pennington v. Crossley*, 1897).

Even when a cheque has reached the creditor, it is merely a *conditional* payment, whether the Post Office is the agent of the sender or of the creditor, for, as already pointed out, the debt against which the cheque is drawn is at once revived when the cheque is dishonoured, unless there is an agreement by the creditor that the cheque itself shall be regarded as a final and conclusive settlement, in which case there is a right of action on the cheque only.

## CHAPTER 14

### INDORSEMENTS

THE term "indorsement" is not defined by the Bills of Exchange Act, but, in reference to bills and cheques, it may be taken to mean the signature on a bill or cheque payable to order by which the transferor (who on signing becomes an *indorser*) signifies his intention to pass the instrument and any rights connected with it to the *transferee* or *indorsee*.

To be legally effective, an indorsement must consist of the signature of the person entitled to indorse, signed by himself or by his duly authorized agent. The authentic or authorized signature of the transferor should be obtained on all cheques or bills negotiated by him so that he may be held liable to subsequent holders as an indorser.

#### Requisites of a Valid Indorsement

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

- (1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

- (2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.
- (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.
- (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described adding, if he think fit, his proper signature.
- (5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.
- (6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

As an indorsement must be written *on the bill itself*, a separate promise in writing to indorse, or an assignment of a bill or note by a separate instrument, is not an indorsement. As by s. 2 an "indorsement" means an indorsement *completed by delivery*, the



signature of the payee or indorsee on the back of a bill or cheque is not an indorsement unless the signer has given effect thereto by delivering the instrument.

Although it is usual for indorsements to be made on the *back* of bills and cheques, s. 32 (1) provides that an indorsement shall be "written on the bill itself", so an indorsement written on the *face* of a bill or cheque is in order if it is identifiable as such.

An "allonge", referred to in s. 32 (1), is a piece of paper attached (by gumming or pasting) to one end of a bill or cheque to provide space for further indorsements when the instrument has been negotiated several times and bears numerous signatures. The first indorsement on an allonge should be partly on the bill and partly on the allonge.

A copy is a reproduction of the bill, including the face of the instrument and any indorsements appearing on the back. Under the last indorsement copied a line is drawn and the words "So far copy" are added, any subsequent indorsements being written under the line. *Copies* are not recognized in this country unless they form part of a bill in a set as provided by s. 71 (see Chapter 10), but in those countries where copies are recognized room for additional indorsements is sometimes found on a copy or copies of the original bill.

In connection with s. 32 (3), the custom whereby dividend warrants payable to two or more persons may be indorsed by any one of the parties is expressly preserved by s. 97 (3). (See Chapter 22.)

### Classes of Indorsements

The Act refers to seven classes of indorsement: (a) Indorsements *in blank*; (b) *Special* indorsements; (c) *Partial* indorsements; (d) *Conditional* indorsements; (e) *Restrictive* indorsements; (f) indorsements *negating* or *limiting* the liability of the indorsers; (g) *Facultative* indorsements, *i.e.*, waiving some or all of the holder's duties.

### Indorsements in Blank and Special Indorsements

34. (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Examples of a *special* indorsement on a cheque payable to Thomas Robinson would be :

" Pay the Acme Cycle Company, Ltd.,  
Thomas Robinson ",

or :

" Pay James Brown or Order,  
Thomas Robinson ".

The indorsement of the company in the first case and of James Brown in the second is necessary before the cheque can be discharged or transferred to another holder.

An example of an indorsement *in blank* would be the signature " Thomas Robinson " on the back of a cheque or bill payable to " Mr. Thomas Robinson or order ", the signature indicating that Thomas Robinson discharges the instrument in return for payment, or that he transfers his rights therein to some person unnamed.

In accordance with s. 8 (3), a bill or cheque on which the *only* or *last* indorsement is an indorsement in blank is payable to bearer, and thereafter no indorsement is necessary. But if the only or last indorsement in blank on a bill or cheque originally payable to order is followed by a special indorsement, the instrument again becomes payable to order. For this reason, a special indorsement on an instrument originally payable to order is said to *control* or *override* a previous indorsement in blank. A special indorsement on a bill drawn payable to *bearer* has no effect and does not make the instrument payable to order.

A special indorsement may be made by the payee or by any indorser, while, in accordance with s. 34 (4), any holder of a bill or cheque originally payable *to order* may convert the last blank indorsement thereon into a special indorsement, and thereby make the instrument payable to order, although by reason of the blank indorsement it had become payable to bearer.

Sometimes the holder of a bill or cheque that is not payable to him takes advantage of the provisions of s. 34 (4) to avoid the liabilities of an indorser by making the instrument payable to an indorsee without affixing his own signature. Suppose Thomas Robinson comes into possession of an order cheque on which the last indorser is Henry Arnold. Robinson may write the words " Pay James Brown or order " above Henry Arnold's signature, and so ensure that, while the cheque will not be paid unless it is indorsed by Brown, he himself will not be liable as an *indorser* because his signature does not appear on the cheque. Nevertheless, Robinson is liable as a transferor by delivery in accordance with s. 58 (3). (See Chapter 11.)

## Partial Indorsements

Partial indorsements [s. 32 (2)], are rarely seen in practice, but examples would be special indorsements in the following terms on a cheque for £100 : " Pay Thomas Robinson or order sixty pounds ", or " Pay Thomas Robinson sixty pounds and James Brown forty pounds ". Both indorsements may operate as an authority to receive payment of the amount specified, but are invalid as a negotiation of the bill, so that the indorsee can neither sue on the instrument nor further indorse in order to transfer the property therein.

## Conditional Indorsements

A **CONDITIONAL INDORSEMENT** is not defined by the Act, but is an indorsement that makes the transfer of the property in a cheque or bill by the indorser to the indorsee dependent upon the fulfilment of a stated condition ; *e.g.* :—

" Pay Thomas Robinson or order on the arrival of s.s. Majestic at Montreal,

James Brown ".

" Pay Thomas Robinson if he marries Anne Taylor,  
James Brown ".

As between the indorser and the indorsee the condition would presumably be operative, so that an indorsee who receives payment of the instrument without fulfilment of the condition may be regarded merely as having received the money in trust for the indorser. But s. 33 protects the payer of a cheque or bill in such circumstances by providing that :—

**33.** Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

This provision is clearly of advantage to bankers, who would usually have no means of satisfying themselves whether a condition imposed by an indorser had been fulfilled or not. It would be illogical to affect the payer of a bill or cheque with a condition in an indorsement when the order addressed to that payer by the drawer cannot be made conditional. On the other hand, the section provides that the power to disregard a condition in an indorsement is *optional*, so that the payer may *if he chooses* refuse payment until he has proof that the condition has been fulfilled.

## Restrictive Indorsements

**35.** (1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed " Pay D. only ", or " Pay D. for the account of X.", or " Pay D. or order for collection ".

As in the case of a conditional indorsement, no duty is imposed on the paying banker to see that the terms of a restrictive indorsement are observed, although he should not pay without inquiry a cheque or bill which is restrictively indorsed to *prohibit further transfer*, but which, nevertheless, bears evidence of subsequent negotiation in the form of one or more indorsements following the restrictive indorsement.

Restrictive indorsement, frequently met with in practice are those which specify that the proceeds of a cheque are to be paid only to a specified account, as in the following examples:

"To be placed to the account of Jones Bros. with the  
Blankshire Bank, Jones Bros."

"To the credit of Brown and Brown with the Alliance  
Bank, Manchester, Brown and Brown".

"Pay to A. L. Turner's A/c, B. Backer".

"Please place to the credit of my account,  
James Brown".

In none of these cases is a further indorsement contemplated by the indorser, and it would clearly be very difficult for a paying banker to justify his action in paying a cheque bearing one of these indorsements and a subsequent indorsement or subsequent indorsements. In the first two cases the *drawee* banker should refuse to pay the cheque unless it was presented by the Blankshire Bank or the Alliance Bank, respectively (or by their collecting agents), but it is not his business to see that the instructions given in such an indorsement are complied with. It would, however, be the duty of the banker *collecting* the proceeds of such a cheque to see that they are placed to the account specified; and, in practice, the collecting bank would indicate this by indorsing the cheque: "Placed to the account of Jones Bros., with us, per pro Blankshire Bank, Abel Moss, Manager".

Sometimes an addition to an indorsement intended to be restrictive may be regarded as invalidating the indorsement as a good discharge, and the cheque in such a case may be returned by the drawee banker marked "Indorsement irregular", *e.g.* :—

1. "Credit Thomas Robinson" (on a cheque payable to Thomas Robinson).
2. "For Lodgment a/c,  
Smith, Brown & Jones".

On the other hand, additions to an indorsement such as "Paid in", "Pay cash", "Received without prejudice", and "Received cash" are in order, but in the last two cases a receipt stamp is required if the amount of the cheque is for £2 or over.

### Negating, Limiting, and Facultative Indorsements

S. 16 provides for circumstances in which an indorser may wish to escape the usual liabilities and obligations of an indorser, or where he may wish to waive some or all of his rights.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation :—

- (1) Negating or limiting his own liability to the holder ;
- (2) Waiving as regards himself some or all of the holder's duties.

Thus, if Thomas Robinson, the payee or indorsee of a bill, wishes to escape liability in the event of dishonour, he may add the words "*sans recours*" or "without recourse to me" after his signature, in which case a subsequent holder would be unable to proceed against him if the bill were unpaid. Or he may add the words "*sans frais*" or "without expense", indicating that, although he is prepared to accept liability if the bill is unpaid, he will not be responsible for any expense incurred by the holder in the event of dishonour, as, for example, expenses for protesting the bill. (See Chapter 19.)

Words such as "*sans recours*" refer only to liabilities *on the bill*: they would not, for example, free an indorser from liability to the true owner for conversion, or from liability to subsequent parties if he dealt with a bill on which a material prior indorsement had been forged.

An indorsement in which the signer waives some or all of his rights (*i.e.*, to the performance by subsequent holders of certain duties) is known as a "*facultative*" indorsement. Thus, in the following example, the indorser does not require the holder to give him notice of dishonour if the bill is refused acceptance or payment. (See Chapter 18.)

Pay James Brown or Order,  
William Robinson.

*(Notice of Dishonour waived.)*

### Cancellation of an Indorsement

An indorser (and all subsequent indorsers who have indorsed prior to the cancellation) may avoid liability if his signature is intentionally cancelled by the holder or his agent [s. 63 (2)]. (See Chapter 18.)

### Bankers and Indorsements

So far as a paying banker is concerned, the indorsement of the payee or indorsee is required on payment as evidence that a cheque or bill has been paid in accordance with the mandate of the customer. If the presenter of an order cheque refuses to sign the cheque in return for receiving the money, the banker should pay only on being given a receipt.

Although a banker must protect the interests of his customers by seeing that indorsements are regular in form, he is not responsible for the *authenticity* of indorsements.

The banker is not concerned with the correctness of indorsements on cheques or bills originally made payable to bearer. But he must see that *all* indorsements (not merely that of the payee) on cheques or bills originally made payable to order are technically correct, and that any *special* indorsements on such instruments are followed by the signatures of the specified indorsees.

If the paying banker is not satisfied with an indorsement, he should return the instrument unpaid and marked "Indorsement requires confirmation" or "Indorsement irregular". If the instrument is presented for payment by the indorser in person, the banker should get him to correct any defect or verify the signature if it is doubtful. If the banker knows that an indorsement is not in the handwriting of the payee or indorsee, he should not pay the instrument without confirmation of the signature, but he cannot,

## INDORSEMENTS

of course, insist that the writing shall be that of the payee, for s. 91 (1) provides that a signature need not be made by a person's own hand, but may be written by or under the authority of the person whose signature it purports to be, *i.e.*, the signature may be that of an authorized agent.

Though there is no legal requirement as to the order in which indorsements should appear, the payee's signature should appear first, and the signatures of special indorseees should immediately follow the relative special indorsements. But it may happen that the payee's indorsement does not appear first (*e.g.*, if the back of the bill is crowded with signatures), in which case the banker should trace the order of transfer to ensure that the payee's signature actually appears, and that all the indorsements are correct.

Even though a cheque paid in by a customer for his credit may not legally require his indorsement, the banker should insure that the cheque is indorsed or stamped with the customer's name so that he can at any time know from whom the cheque was received.

### Indorsements Generally

All indorsements should be in ink, though they are valid if made in pencil or by means of an impressed stamp, provided that the impression is made by or under the authority of the person purporting to sign. Indorsements in pencil are discouraged owing to the liability to obliteration or alteration, but usually bankers pay without question cheques or bills which bear a pencilled indorsement followed by other indorsements in ink.

The Council of the Institute of Bankers in *Questions on Banking Practice*, 8th ed., Q. No. 987, discourages indorsements wholly impressed by rubber stamp, on account of the risk of fraud and the inconvenience of obtaining proof—which a banker is fairly entitled to demand in such cases—that the stamp was impressed by authority. Similarly, an indorsement entirely in printed characters would not usually be accepted, although quite valid.

If a customer requires his banker to accept indorsements impressed wholly by rubber stamp on cheques, etc., paid in for collection (as happens in the case of certain railway companies and large industrial concerns), the banker should take an indemnity from the customer to cover him against improper use of the stamp.

The collecting banker should refuse to accept indorsements in lead pencil on cheques paid in by his customers, as he will invariably be put to the trouble of confirming them to the paying banker.

No objection can be raised to an indorsement in which the name of the payee is impressed, but wherein the signature of the agent or official appears in ink, as frequently happens in indorsements on behalf of a limited company or local authority.

The *surname* in the indorsement should be identical with the surname given as that of the payee or indorsee, whether the payee or indorsee is correctly named or not, for, if the name is not correctly given, s. 32 (4) authorizes the holder to write his name incorrectly in accordance with the spelling as given, adding his proper signature if he thinks fit.

*Christian* names need not be written in full, even if they are so given on the instrument; but if the indorser chooses to give his Christian name or names in full, then the spelling must correspond exactly with that on the instrument. Moreover, the Christian name can be given in full in an indorsement although initials only are given on the instrument. A *surname* only will not suffice for an indorsement where the payee's or indorsee's name contains no Christian name or initial unless the payee's or indorsee's name happens to be a surname used as a firm name or name of a club, etc., e.g., "Lucille", "Murrays"; or unless it is the title of an earl, a duke, a lord, etc., e.g., "Verulam" (for the Earl of Verulam).

### Courtesy Titles

As the guiding principle is that an indorsement should be the ordinary form of signature of the payee or indorsee, cheques bearing indorsements that include courtesy titles or forms of address are usually returned unless such expressions are added to a signature merely by way of description. On the other hand, it is usual in certain foreign countries to include courtesy titles with indorsements, so no objection should be raised on this ground to indorsements by *foreign* payees or indorsees.

Thus, indorsements in the form "Mr. Thomas Robinson"; "Thomas Robinson, Esq."; "Major Thomas Robinson"; or "Dr. Thomas Robinson" should not be accepted, for in this country the recognized form of signature in such cases is "Thomas Robinson", with or without the descriptive expressions "Major" or "M.D." in the last two cases.

### Examples of Correct Forms of Indorsement by Individuals

PAYEE	FORM OF INDORSEMENT
Mr Thomas Robinson.	Thomas Robinson or T. Robinson.
or Thomas Robinson.	Thomas Robinson, Thomas Robertson (where payee's name is correctly Robertson).
or T. Robinson.	Thomas Robinson, Senior.
Dr Thomas Robinson.	Thomas Robinson, M.D.
"	Thomas Robinson, F.R.C.S., or simply Thomas Robinson.
Capt. Thomas Robinson.	Thomas Robinson, or Thomas Robinson, Capt.
Thomas Robinson, Esq.	Thomas Robinson.
Mr. Thomas Robinson,	Thomas Robinson or Thomas Robinson, Senior.
Senior.	
— Robinson.	Thomas Robinson.
Sir Thomas Robinson.	Thomas Robinson, or Thomas Robinson, Kt., or Thomas Robinson, Bart.
	Robinson.
Lord Robinson.	Middlesex.
The Duke of Middlesex.	



## INDORSEMENTS

## Examples of Incorrect Forms of Indorsement by Individuals

PAYEE	FORM OF INDORSEMENT	IRREGULARITY
Mr Thomas Robinson.	Mr Thomas Robinson.	Courtesy title should be omitted in a signature.
"	Thomas Robinson, Junior.	Mr Thomas Robinson is <i>prima facie</i> Thomas Robinson, Senior (see above).
"	Thomas Robynson.	Spelling differs.
"	Tomas Robinson.	Initials differ.
"	T. P. Robinson.	Full signature required, including christian name or initials.
"	Robinson.	Courtesy title should be omitted.
Thomas Robinson, Esq.	Thomas Robinson, Esq.	" "
Rev. Thomas Robinson.	Rev. Thomas Robinson.	" "
Dr Thomas Robinson.	Dr Thomas Robinson.	" "
Capt. Thomas Robinson.	Capt. Thomas Robinson.	" "
"	Thomas Robinson, Lieut.	Description incorrect, should be omitted.
Mr. Thomas Robinson, Junior.	Thomas Robinson.	See above; should be Thomas Robinson, Junior.

## Indorsements of Married Women and Widows

A cheque payable to "Mrs. Thomas Robinson" should be indorsed by the usual signature of the payee, followed by words indicating that she is "Mrs. Robinson", i.e., either the wife or widow of Thomas Robinson, e.g., "Jane Robinson, wife of Thomas Robinson", or "Jane Robinson, widow of Thomas Robinson".

A cheque payable to a married woman or a widow in her maiden name should be indorsed with her usual signature, followed by words indicating that her name has been changed by marriage. Thus, if Mrs. Jane Robinson was originally Miss Jane Brown, she should indorse a cheque made out in the latter name: "Jane Robinson (née Brown)."

## Examples of Correct Indorsements by Married Women

PAYEE	FORM OF INDORSEMENT
Mrs Thomas Robinson.	Jane Robinson, wife of Thomas Robinson.
	Jane Robinson, widow of Thomas Robinson, deceased.
	Jane Robinson (Mrs. Thomas Robinson).
Mrs T. Robinson.	Jane Robinson, wife of T. Robinson, or Jane Robinson (Mrs T. Robinson), etc.
Mrs Robinson.	Jane Robinson, or (Mrs) Jane Robinson.
Mrs Capt. Robinson.	Jane Robinson, wife of Capt. Robinson.
Miss Jane Taylor (now married).	Jane Robinson (née Taylor), or Jane Robinson, formerly Jane Taylor.

## Examples of Incorrect Indorsements by Married Women

PAYEE	FORM OF INDORSEMENT	IRREGULARITY
Mrs. Thomas Robinson.	Jane Robinson.	Should indicate that she is the wife or widow of Thomas Robinson.
"	Mrs Jane Robinson.	Courtesy title should be omitted.
"	Mrs Thomas Robinson	Not Mrs Robinson's signature.
"	Mrs J. Robinson.	Courtesy title should be omitted.
Mrs Robinson.	Jane Robinson, née Jane Taylor.	Née is, for obvious reasons, correctly applied to the surname only.
Miss Jane Taylor (now married).		

## Indorsements of Joint Payees (other than Trustees and Executors)

Cheques payable to two or more distinct payees should be indorsed by each of the payees individually, unless one has authority to sign on behalf of all, or the payees are in partnership and the indorsement indicates that it is the signature of a partner on behalf of the firm.

Thus a cheque payable to "Mr. Thomas Robinson and Mr. James Brown", or "Messrs. Thomas Robinson and James Brown", or "Thomas Robinson, Esq. and James Brown, Esq.", should be indorsed by both payees, and if the signatures have obviously been written by the same hand, confirmation of the indorsement should be required, unless the banker has knowledge that one payee can sign for both.

If a cheque is payable to "Thomas Robinson and another", it should be indorsed "For self and James Brown, Thomas Robinson", or "For self and another, Thomas Robinson", but any other variants should not be accepted without confirmation, as, for example, the signature "Thomas Robinson" alone, or the signature "Thomas Robinson" with another signature in a different handwriting. (But see Chapter 22 regarding indorsements on Dividend Warrants.)

### Examples of Correct Indorsements by Joint Payees

PAYEES	FORM OF INDORSEMENT
Messrs. Thomas Robinson and James Brown.	Thomas Robinson, James Brown (in different handwritings).
Messrs. Robinson and Brown.	For self and Thomas Robinson, James Brown (if duly authorized to sign).
	Robinson & Brown (if a firm, and name signed by one of the partners—see below).
Mr. Thomas Robinson and Mrs. Jane Robinson.	{ Thomas Robinson. Jane Robinson.
	For self and Mrs Robinson, Thomas Robinson (authority may be presumed in this case).

### Examples of Incorrect Indorsements by Joint Payees

PAYEES	FORM OF INDORSEMENT	IRREGULARITY
Messrs. Thomas Robinson & James Brown.	Thomas Robinson { in same James Brown { handwriting.	Both should sign independently, unless one has authority to sign for both (see above).
	Robinson & Brown.	Two distinct signatures required, or an authorized signature on behalf of both.
Mr Thomas Robinson and Mrs. Jane Robinson.	T. & J. Robinson.	do. do.

## Indorsements of Agents

By s. 91 it is sufficient if the signature requisite for an indorsement is written by some person acting by or under the authority of the payee or indorsee. But, in order that the principal and not

## INDORSEMENTS

the agent shall be liable, the signature must unmistakably indicate that the agent is signing on behalf of a named principal.

Any person with or without power to contract on his own may act as an agent to sign on behalf of another, and a "person" for this purpose includes such bodies as a registered company and a partnership.

As a rule, agents in this country sign on behalf of their principals by means of a *per procuration* signature in the form shown on page 91. *Per procuration* signatures in which the abbreviation "per pro.", or "p.p.", does not *precede* the name of the principal are not accepted without confirmation, e.g., on a cheque payable to "Thomas Robinson", the indorsement "Thomas Robinson *per pro.* James Brown" would be valid, but would usually be returned for confirmation.

The abbreviation "per pro." or "p.p." is in itself sufficient to indicate that the agent has authority to sign, but the words "for", "per", or "pro" are not in themselves so indicative, and are not usually accepted unless the signature of the agent is accompanied by a word or words specifying his capacity.

A paying banker should demand confirmation of the authority to sign in any case where an agent signs on behalf of a company or local authority and the status of the person signing is not such as would entitle the banker to assume that he has in fact authority to sign. (See Indorsements of Companies, below.)

In the absence of a *per procuration* signature, agents for individuals usually sign in one of the following forms:—

For Thomas Robinson,  
James Brown,  
Agent (or Secretary or Manager).

Thomas Robinson,  
per James Brown,  
Agent.

Thomas Robinson,  
by his Attorney, James Brown.

Thomas Robinson,  
by James Brown, Attorney.

Unless the circumstances are suspicious, bankers do not usually dishonour cheques indorsed by agents on behalf of individuals, even if such cheques are presented for encashment over the counter. But there is nothing to prevent the banker from asking for confirmation of the authority for a "per pro." or other form of signature by an agent for an individual. If the endorsement is not "per pro.", confirmation should always be required if the status of the signer is not given, e.g., "Thomas Robinson, by (or per) James Brown", or "For Thomas Robinson, James Brown". In such cases, there is nothing to indicate that the person signing is likely to have authority, and a paying banker is justified in demanding a confirmation or an addition of words specifying the capacity of the signer.

The mere addition to the agent's signature of words describing him as an agent will not make his indorsement that of the principal

so as to exclude the agent's personal liability. The principal must be *named*, and the signature must indicate that it is on his behalf. Thus, on a cheque payable to "Thomas Robinson", an indorsement in the form "James Brown, agent to Thomas Robinson", would not be accepted because the signature is strictly that of James Brown, with the addition of descriptive words, and is not binding on the principal.

The signature of the agent himself must be in its usual form. Words of title or courtesy must be omitted unless they are merely descriptive. The initials of the agent with the principal's name are not sufficient. Titles or words of courtesy may, however, attach to the name of the principal, because he is not himself signing.

An agent has no implied power to delegate his authority to sign on behalf of another, and indorsements that indicate such a delegation should be returned for confirmation or for the signature of the agent himself.

#### Examples of Correct Indorsements by Agents (Signed on behalf of Thomas Robinson)

per pro. Thomas Robinson,  
James Brown.  
James Brown,  
per pro. Thomas Robinson.  
For (or per) Thomas Robinson,  
James Brown, Agent.  
Thomas Robinson,  
by (or per) his Attorney, James Brown.

per pro. Mr Thomas Robinson,  
James Brown.  
per pro. Capt. Thomas Robinson,  
James Brown.  
Thomas Robinson,  
per (or by) James Brown, Attorney.  
per pro. Thomas Robinson,  
James Brown & Co.  
per pro. Thomas Robinson, Esq.,  
James Brown.

#### Examples of Incorrect Indorsements by Agents (Signed on behalf of Thomas Robinson)

##### FORM OF INDORSEMENT

For (or pro.) Thomas Robinson,  
James Brown.  
James Brown  
For (or pro.) Thomas Robinson.  
Thomas Robinson,  
per (or by) James Brown.  
Thomas Robinson,  
per pro. James Brown.  
James Brown,  
Agent (or Attorney) for  
Thomas Robinson.  
Per pro. (or for) Thomas Robinson,  
James Brown,  
per (or by) William Brown.  
Per pro. Thomas Robinson,  
J. B.  
Per pro. Thomas Robinson,  
Brown.  
Per pro. Thomas Robinson,  
Capt. James Brown.

##### IRREGULARITY

"For" or "pro." is not a sufficient indication of authority. "Agent" or some such word should be added.  
" " " "  
"Per" or "by" is no indication of authority. Word or words indicating capacity required.  
"Per pro." must precede the principal's name.  
Agent's signature only, as the additional words are merely descriptive.  
Delegation of authority not permissible.  
Signature of agent required, and not merely initials.  
Agent's full signature required.  
Agent's signature must appear without "Capt." or with "Capt." after it.

A cheque drawn in the form "Pay B. Jones per S. Brown", indicating that Brown is to receive the money as B. Jones's agent, should be discharged by S. Brown in any of the correct forms for an

## INDORSEMENTS

agent, e.g., "B. Jones per S. Brown, Attorney", or "Per pro. B. Jones, S. Brown", or "For B. Jones, S. Brown".

## Indorsements of Executors and Administrators

As executors have implied power to delegate their authority to one (or some) of their number (see Chapter 5), no objection can be raised to the indorsement of cheques by one executor, provided he clearly indicates *that he is an executor*, and that he signs on behalf of himself and his co-executors. Although authority to sign may be delegated by several executors to one of their number, they have no power to delegate their authority to a third party, so an indorsement for executors should be refused if the person signing does not indicate that he is an executor.

If a will exists, the executors are usually the only persons entitled to deal with cheques or other property of the deceased. If executors are dead or do not wish to act, or if there is no will, power to deal with the property of the deceased is vested in an administrator or administrators appointed by the Court, and their powers of signing and indorsing are similar to those of executors.

Cheques payable to a deceased person must be indorsed by his executors or administrators in the recognized way. The paying banker may ask for production of the probate or letters of administration or for confirmation by the presenting banker, though this is not usual.

The signature of a widow or son of a deceased should not be accepted in indorsement of a cheque payable to the deceased, unless such individual is the personal representative of the deceased.

## Examples of Correct Indorsements by Executors and Administrators

(Signed on behalf of Thomas Robinson, deceased)

For self and { Co-executor(s)  
or  
Co-administrator(s) } of Thomas Robinson, deceased,  
James Brown.

For self and { Co-executor(s)  
or  
Co-administrator(s) } of the late Thomas Robinson,  
James Brown.

For the Executors of the late Thomas Robinson,  
James Brown,  
Executor.

Per pro. the { Executors  
or  
Administrators } of Thomas Robinson, deceased,  
James Brown, Executor.

James Brown, { Joint Executors  
or  
Administrators } of Thomas Robinson, deceased.  
William Brown,

James Brown, sole { Executor  
or  
Administrator } of Thomas Robinson, deceased.

Jane Robinson, sole { Administratrix  
or  
Executrix } of Thomas Robinson, deceased.

## Examples of Incorrect Indorsements by Executors

FORM OF INDORSEMENT	IRREGULARITY
For executors of Thomas Robinson, deceased, James Brown.	Signature does not indicate that <i>Brown</i> , is an executor signing for all the executors.
For self and Co-executors, James Brown.	Indorsement must specify name of deceased.
Per pro. Executors of Thomas Robinson, James Brown.	Capacity of the signer as executor must be indicated.
Per pro. Thomas Robinson, deceased, James Brown, Executor.	Signer cannot sign as agent of a deceased person.

## Indorsements by Trustees

As trustees cannot ordinarily delegate their authority, and must, as a rule, act *personally* and *jointly* in regard to all matters connected with the trust, all trustees should usually be required to join in the indorsement of a bill or cheque payable to trustees or to a trust. Occasionally, a collecting banker is asked to accept and to guarantee endorsements on behalf of a trust which are not signed by all the trustees. In such a case, the banker should ensure, by reference to the trustees' deed of appointment, that they have power so to delegate their authority to sign and, to safeguard his own position, should take an indemnity signed by all the trustees.

If a cheque is payable to a person whose estate is vested in the hands of trustees, the latter should all indorse the instrument and indicate clearly that they sign as trustees of the payee concerned.

## Examples of Correct Indorsements by Trustees

(e.g., of Thomas Robinson, deceased)

PAYEE	FORM OF INDORSEMENT
Trustees of the late Thomas Robinson.	James Brown } Trustees of Thomas
James Brown } Thomas Robinson, deceased.	William Brown }
of the late Thomas Robinson, Trustees	James Brown } Trustees of the late
Trustees of Thomas Robinson.	William Brown } Thomas Robinson.
Trustees of Thomas Robinson, deceased.	James Brown, Sole Trustee of Thomas Robinson, deceased.

## Examples of Incorrect Indorsements by Trustees

FORM OF INDORSEMENT	IRREGULARITY
For self and Co-trustees of Thomas Robinson, deceased, James Brown.	One trustee cannot, as a rule, sign on behalf of all.
Per pro. Trustees of Thomas Robinson, deceased, James Brown.	" " " "
James Brown } (On cheque payable to Trustees	Signers must indicate that they are the trustees of Thomas Robinson.
William Brown } of the late Thomas Robinson).	Designation should be "sole trustee" or the signature or signatures of remaining trustee or trustees should be added.
James Brown, Trustee of Thomas Robinson, deceased.	Trustee cannot sign as agent of a deceased person.
Per pro. (or for) Thomas Robinson, James Brown, Trustee (on cheque payable to Thomas Robinson, deceased).	

## INDORSEMENTS

## Indorsements on behalf of Partnerships

Any partner in a *trading* firm has implied power to bind the firm by signing its name on negotiable instruments. He may sign with or without the addition of his own name or of words indicating his authority. When the partner's name is omitted, there is nothing to guide the banker as to whether the signature was or was not written by a partner, and all he can do is to ensure that the indorsement strictly conforms to the firm's name on the instrument.

If a firm's name is wrongly given, the partner should sign in the same way and add the firm's correct name underneath.

As any partner has implied power to sign for a trading firm, a banker would not usually return a cheque or bill drawn by a firm payable to "selves" and signed in a different handwriting from that of the indorsement.

A partner in a *non-trading* firm can sign for the firm only if authorized to do so by all the partners, in which case the rules as to correct signature are the same as apply to trading firms.

## Examples of Correct Indorsements on behalf of Partnerships

## FORM OF INDORSEMENT

PAYEE  
Messrs. Robinson & Co.  
Messrs. Thomas Robinson  
& Co.  
Messrs. Robinson,  
or  
Messrs. Robinsons.  
Messrs. Robinson Bros.  
Messrs. Robinson & Brown.

Robinson & Co. or Per pro. Robinson & Co.,  
Thomas Robinson.  
Thomas Robinson & Company.  
Thomas Robinson & Co.  
For Thomas Robinson & Company,  
Thomas Robinson,  
Partner.  
Robinson and Robinson.  
Robinson & Son.  
Thomas Robinson & Son.  
Robinsons.  
Robinson Bros.  
Robinson & Brown.  
Thomas Robinson }  
James Brown }

Thomas & Jane Robinson.  
Thomas & William Robinson.  
Robinson Bros.  
T. Robinson ; Jane Robinson.  
Per pro. Robinson Bros.,  
Thomas Robinson.  
Per pro. Robinson & Brown,  
Thomas Robinson.  
For Robinson & Brown,  
Thomas Robinson,  
Principal.

## Examples of Incorrect Indorsements on behalf of Partnerships

## FORM OF INDORSEMENT

PAYEE  
Messrs. Robinson & Co.  
Messrs. Thomas Robinson  
& Co.  
Messrs. Robinson.

T. Robinson & Co.  
Robinson & Brown.  
Robinson & Co.  
T. Robinson & Co.,  
James Brown.  
Robinson & Co.  
T. Robinson & Co.

Messrs. Robinson Bros.

T. & J. Robinson.  
{ T. Robinson.  
{ J. Robinson.  
Per pro. T. & J. Robinson,  
T. Robinson,  
T. Robinson & Bros.

## IRREGULARITY

Name differs, and may be that of another firm.

"  
The signature should indicate the authority of the signer, as, for example, by the addition of the word "partner". Payee's name suggests two or more persons of the name Robinson, whereas the indorsements are of firms which may include persons not so named.

Signatures do not indicate that the persons included in the names are brothers.

"  
Firm name differs."

## Indorsements on behalf of Registered Companies

By s. 30 of the Companies Act, 1929, an indorsement is deemed to have been made on behalf of a registered company when it is made in the name of the company, or by or on behalf of or on account of the company, by a person acting under its authority.

Although the mere writing or impressing of the name of a company by some one acting under its authority is thus valid, bankers generally refuse to accept without confirmation an indorsement consisting of the name of a registered company without any indication of the name and status of the agent who wrote or impressed the name. Moreover, bankers will not, as a rule, accept indorsements on behalf of companies unless they are made by persons usually in a position to bind the company, *e.g.*, directors, general managers, secretaries, or, in the case of a company that is being wound up, the liquidator. Indorsements by subordinate officials (such as cashiers, foremen, ledger clerks, or private secretaries) should not be accepted without confirmation unless, in the case of cashiers, the company is of such dimensions as to render it likely that a cashier would have authority to sign on its behalf.

If the words "per pro." precede the company's name (*e.g.*, per pro. J. Brown & Co., Ltd., H. Jones), the express authority indicated by the words "per pro." justifies the banker in accepting the indorsement even though the signer does not state his official capacity. But if an official capacity is given in such an indorsement, it should be such as is consistent with the power to endorse "per pro." or "for" a limited company.

Officials who have authority to sign on behalf of a company have usually no right to delegate that power, so confirmation should be required of indorsements that bear evidence of such delegation.

Important legal decisions concerning signatures on behalf of limited companies are discussed at pages 92 and 94, to both of which reference should be made at this point.

An indorsement on behalf of a limited company should correspond exactly with the name of the company given on the instrument; but, if the name so given is inaccurate or incomplete, the indorser should sign in the incorrect form and add the correct name underneath.

### Examples of Correct Indorsements on behalf of a Limited Company

PAYEE  
The Acme Cycle Co., Ltd.

FORM OF INDORSEMENT  
 { Per pro. The Acme Cycle Co., Ltd.,  
 or { For the Acme Cycle Co., Ltd.,  
 or { For and on behalf of the Acme Cycle Co., Ltd.  
 or { The Acme Cycle Co., Ltd.,  
     John Brown,  
         { Director.  
         or { Secretary.  
         or { Manager.



PAYEE	FORM OF INDORSEMENT
The Acme Cycle Co., Ltd.	The Acme Cycle Co., Ltd., per John Brown, Director. or { Secretary. or Manager.
Do.	Per pro. The Acme Cycle Co., Ltd., John Brown. (Though this form is legally in order, some banks will not accept it without confirmation.)
Do.	The Acme Cycle Co., Ltd. (in Liquidation.) John Brown, Sole Liquidator.
Do.	The Acme Cycle Co., Ltd., John Brown & Co., London Agents.
Thomas Robinson & Co., Ltd. (Company's name : T. Robinson & Co., Ltd.)	For and on behalf of : Thomas Robinson & Co., Ltd., T. Robinson & Co., Ltd., James Brown, Director. or { Secretary. or Manager.

**Examples of Unacceptable Indorsements on behalf of a Limited Company**

PAYEE	FORM OF INDORSEMENT	IRREGULARITY
The Acme Cycle Co., Ltd.	Per pro. The Acme Cycle Co., Ltd. James Brown, Cashier. or { Foreman. or Clerk.	Authority of signer not usually regarded as sufficient without con- firmation.
Do.	For Acme Cycle Co., Ltd., per pro. John Brown, Director. H. Smith, Private Secretary.	Delegation of authority to sign is not accepted without confirmation.
Do.	For Acme Cycle Co., Ltd. H. Smith, pro { Secretary. or Director.	" "
Do.	The Acme Cycle Co., Ltd.	Quite legal, but usually returned for confirma- tion.
Do.	Per pro. Acme Cycle Co., John Brown, Director. or { Secretary.	The word "limited" is essential and must appear.
Do.	John Brown, Director, The Acme Cycle Co., Ltd.	Merely the signature of the director, with a description of himself added.
Thomas Robinson & Co., Ltd.	For T. Robinson & Co., Ltd., John Brown, Director.	Names of Company do not agree.

**Indorsements of Official and Fiduciary Payees**

The name of the payee or indorsee is sometimes followed by a word or words indicating that the money is being paid to the person named in an official or fiduciary capacity. In such a case, the indorsement must be followed by a description corresponding to that on the instrument.

Thus, the indorsement on a cheque payable to "William Brown, Treasurer of Northtown U.D.C.", or to "James Brown, Collector

of Taxes", should consist of the signature of the person named followed by a description corresponding to that given.

If a cheque is payable to the holder of an office for the time being, without actually specifying the name of the individual (*e.g.*, to "The Treasurer, Northtown U.D.C." or to "The Collector of Taxes"), the indorsement must include the signature of the person holding the position as well as the description given.

The fact that the payee of a cheque *happens* to hold an official or fiduciary position does not make it necessary for him to sign in that capacity if the cheque is made payable to him personally, even though the money is intended by the drawer to be paid for official or fiduciary purposes. The indorser may if he wishes add a description of his capacity, but the addition of such words should not be such as to make it necessary for the banker to demand confirmation of the signature. So, where a cheque payable to "A. M. Chambers, Esq." is indorsed "A. M. Chambers, for self and Co-trustees of the late Arthur Chambers", the paying banker must not ignore the fact that one trustee cannot, as a rule, sign on behalf of all, and he must therefore demand confirmation of the indorsement.

#### Examples of Correct Indorsements of Official or Fiduciary Payees

PAYEE	FORM OF INDORSEMENT
Thomas Robinson, Treasurer, Northtown U.D.C.	Thomas Robinson, Treasurer, Northtown U.D.C.
The Treasurer, Northtown U.D.C.	For Northtown U.D.C., Thomas Robinson, Treasurer.
The Mayor of Northtown.	Thomas Robinson, Mayor of Northtown.
The Collector of Taxes.	Thomas Robinson, Collector of Taxes.
The Liquidator, James Brown & Co., Ltd.	Thomas Robinson, Liquidator of James Brown & Co., Ltd.

#### Examples of Incorrect Indorsements of Official or Fiduciary Payees

PAYEE	FORM OF INDORSEMENT	IRREGULARITY
Thomas Robinson, Treasurer, Northtown U.D.C.	Thomas Robinson.	Requires official description
Treasurer, Northtown U.D.C. Do. do. do.	Thomas Robinson. Treasurer, Northtown U.D.C.	Requires "signature" of the official.
Northtown U.D.C.	For Northtown U.D.C., James Martin, Collector.	Requires confirmation or signature by an authorized official. A rate collector is not regarded as being so authorized.
Collector of Taxes.	Per pro. Thomas Robinson, Collector of Taxes, James Brown.	Should be confirmed, as authority to discharge can- not be delegated.
Thomas Robinson, A/c. A.B.	Thomas Robinson.	"A/c A.B." should be added.

#### Indorsements by Mark

Cheques or bills made payable to persons unable to write should be indorsed by the "mark" of the payee, properly authenticated in

## INDORSEMENTS

the recognized form as indicated below, and the witness, who should know the payee and should state his name, occupation, and address under or alongside the word "witness". This formality and the full particulars of the witness are necessary in case the banker has to call upon the witness to prove the identity of the signer.

John      His  
            X      Smith.  
            mark.

Witness :  
James Brown, Grocer,  
17, High Street, Northtown.

The paying banker should demand confirmation of the discharge in the case of any doubt, or of any material departure or omission from this recognized form. For instance, the form "X Jane Smith, her mark, in the presence of J. Jones, High Street, Northtown" should not be accepted, as it does not clearly indicate that "J. Jones" signs as a witness.

### Indorsements of Impersonal Payees

It was decided in *North and South Insurance Company v. National Provincial Bank*, 1935, that instruments in the form of cheques payable to impersonal payees, e.g., "Wages or order", "Cash or order", "National Health Insurance or order", etc., do not come within the scope of s. 7 (3), i.e., the payees are not "fictitious or non-existing" persons, and the instruments are not valid as cheques because no payee is indicated. It is, therefore, wise to pay to the drawer himself or to his known agent.

A distinction may possibly be drawn between instruments of this kind, that are clearly intended to be cashed by the drawer or his agent, and cheques made payable to payees such as "Water Rate or order", "Income Tax or order", "Rent of 40 High Street or order", in all of which cases the drawer presumably intends the money to reach the recognized collector of the rates or taxes, or the person entitled to the rent. In such cases, the paying banker might be satisfied with a discharge by some person apparently intended to receive the funds (e.g., the local collector of rates or taxes), but it might be safer to refuse to pay such instruments except to the drawer or his known agent.

The drawer's indorsement should be required on cheques payable to a specified account, presumably in his own name, e.g., "Farm Account or order", or "Deposit Account No. 2 or order".

### Indorsements of Anomalous Payees and of Cheques Irregularly Drawn

Customers are so careless in writing cheques that it is sometimes difficult for the banker to know what they intend, but collecting and paying bankers must nevertheless see that a proper discharge

is obtained and that any indorsements are in order. The following are some special cases frequently met with in practice :—

### How DRAWN

Bearer or order.

Bearer (Mrs. Robinson) or order,  
T. E. Robinson.

Bearer (my wife) or order,  
T. E. Robinson.  
— or order.

Thomas Robinson or Bearer (with  
last word crossed out).  
Thomas Robinson or Order (with last  
word crossed out, followed by  
drawer's initials).

Thomas Robinson only . . .

Thomas Robinson . . .

Thomas Robinson, or order of James  
Brown.

Self or Order, Thomas Robinson.

A/c Thomas Robinson or order.

Thomas Robinson in full settlement.

Pay to the order of the R.S.I. Insurance  
Company or Bearer.  
Pay bill attached or Bearer.

Thomas Robinson or Bearer, indorsed  
Pay to the order of James Brown,  
Thomas Robinson.

### Comments

No indorsement necessary, as instrument is  
payable to bearer.  
Mrs. Robinson's discharge should be obtained.

" " " "

Cheque should be returned as irregularly  
drawn, since a payee should be specified.  
Requires the indorsement of Thomas  
Robinson.

Sometimes paid without indorsement as a  
bearer cheque, although most bankers would  
return cheque marked "Requires payee's  
indorsement or completion of alteration".  
Should be indorsed by Thomas Robinson  
only, and the signature confirmed by the  
collecting banker, unless the cheque is  
presented in person, when identification of  
the payee should be insisted upon. If the  
cheque bears evidence of transfer in the  
form of more than one indorsement, it  
should be returned with the answer:  
"Cannot pay without confirmation; cheque  
bears evidence of transfer".

Such a cheque is regarded as payable to order,  
and should be indorsed by the payee.  
Either person named may give an effective  
discharge.

Requires indorsement of the drawer. In such  
a case indorsement by an agent should not  
be accepted.

Requires the indorsement of Thomas Robinson,  
or "Placed to the credit of payee's account  
with us", followed by the signature of the  
collecting banker.

Should be indorsed in the same terms. An  
indorsement, "Thomas Robinson in part  
payment", should be returned as irregular.  
The company's indorsement should be  
required.

Cheque payable to bearer, but should not be  
paid unless the bill referred to is handed  
over in return for the payment.

No indorsement required, as cheque is originally  
payable to bearer, and special indorsement  
does not make it payable to order.

## Answers on Cheques returned on Technical Grounds

The reason for the dishonour of a cheque should be written on  
the cheque by the paying banker, so that the collecting banker or  
person to whom the cheque is returned may know what has to be  
done to put matters right, and so that the credit of the drawer may  
not be affected by non-payment of the cheque.

Answers on returned cheques are usually written in the left-  
hand top corner, and abbreviations (such as "E/1"; "R/D", etc.)  
must not be used, as the Clearing Bankers will not accept them.

If objection is raised to the manner in which the cheque is  
drawn, the answer should be "Cheque Irregularly Drawn" or  
"Requires Payee's name", etc.

If the indorsement of the payee is missing, the usual answer is "Requires Indorsement" or "Payee's indorsement required"; but if the missing indorsement is one that should follow a special indorsement, then the omission should be indicated in the answer by some such words as "Requires third indorsement", or "Indorsement of Thomas Robinson required".

Particular care is necessary to ensure that special indorsements are properly completed, for a variety of forms are used by indorsers in making cheques payable to special indorsee. The usual form is "Pay to James Brown or order, Thomas Robinson", but the same intention is evidenced, and the indorsee's signature should be obtained, in respect of such forms as "Transfer to James Brown, Thomas Robinson", "Thomas Robinson in favour of James Brown", or "Thomas Robinson to the order of James Brown".

When a cheque is not indorsed by the payee, the collecting banker may obviate the need for obtaining the payee's discharge by writing on the back of the cheque

"Placed to the credit of payee's account with us,  
per pro. The Northern Bank, Ltd.,  
James Brown, Manager".

To save trouble, such a discharge is usually accepted by bankers in this country, but it is open to some danger, as the paying banker may be held liable by his customer for having paid without the signature of the payee, although he would no doubt be indemnified by the collecting banker in respect of any loss that might arise. On the other hand, the collecting banker may, in fact, be authorized to indorse cheques in this way on behalf of a customer, as, for example, when the latter is travelling abroad. Then the best form of discharge is :—

"Indorsed on behalf of and under the authority of Thomas Robinson,  
per pro. the Northern Bank, Ltd.,  
James Brown, Manager".

When a cheque is collected for a payee who is a customer of another branch and the payee does not indorse, the collecting branch should indorse it in the following form (the words "Advised to the credit, etc.", must not now be used) :—

"Placed to the credit of payee's account at our Northtown Branch,  
per pro. the Northern Bank, Ltd.,  
James Brown, Manager".

If an indorsement is irregular or for any reason unacceptable, the usual answers in practice are "Indorsement irregular", or "Indorsement requires Banker's Confirmation". Most indorsements refused on account of irregularity or unacceptability are confirmed by the collecting banker, who writes on the back of the instrument the words "Indorsement confirmed", and adds his signature as an indication that he vouches for the authenticity of

the discharge to which exception is taken. The banker so signing is liable to indemnify the paying banker if the indorsement turns out to be other than what it purports to be.

The phrase "Indorsement confirmed", followed by the banker's signature, is to be preferred to "Indorsement guaranteed", for in the second case the signature may be regarded as a guarantee requiring a 6d. stamp.

Banks in *Scotland* confirm indorsements with a rubber stamp without the signature of an official, and have undertaken to indemnify any English bank against any liability that may arise through the acceptance of such stamped confirmation. Scottish banks in *London* follow the English practice of *signing* these confirmations.

### Indorsements in Foreign Language

An indorsement in a foreign language should not be accepted unless the banker is satisfied as to its correctness and completeness. As a rule, no difficulty is experienced in dealing with indorsements in a European language, but care is needed with indorsements in *oriental characters*. These are sometimes accompanied by a translation, but this should not be regarded as correct unless it is certified by a notary or confirmed by a banker. The Council of the Institute of Bankers suggest that, if such indorsements are not accepted, the answer given by the paying banker should be—

"*Fourth* (etc.) indorsement requires notarially certified translation, or will pay on banker's confirmation".

## CHAPTER 15

### THE PAYING BANKER

THE principal feature of the relation between banker and customer is the obligation of the banker to pay his customer's cheques up to the amount of his credit balance on current account, or up to the limit of an agreed overdraft. This obligation implies that a banker who does not obey the mandate of his customer, properly given, may render himself liable to the customer for breach of contract, and is liable to pay substantial damages if the customer's credit is injured by reason of the dishonour of his cheques.

If objection is drawn, the answer of the banker to honour his customer's cheques depends on the important provisos or conditions. First, the "Requires Payee's"

customer must have an account on which the banker usually allows cheques to be drawn, *i.e.*, a current or drawing account. Secondly, the state of that account must warrant the payment, *i.e.*, there must be either sufficient funds to the customer's credit, or an arrangement for an overdraft to an agreed limit which would not be exceeded by the payment of the cheque. Thirdly, the cheque must be signed by or on behalf of the customer, be drawn in legal form, and purport to be properly indorsed, if indorsement is necessary. Fourthly, there must be no legal reason or excuse justifying a refusal to pay. Finally, the cheque must be presented during recognized business hours at the branch where the customer's account is kept, or be presented at that branch through the clearing.

A banker's obligation to pay cheques does not extend to bills of exchange accepted by a customer payable at his bank, although a banker who had paid such bills without question for some time might be liable for damages if, without first giving reasonable notice to the customer, he suddenly refused to do so.

### The Customer's Right to Draw Cheques

The mere fact that a person is a customer, with some sort of an account at a bank (*e.g.*, a deposit account or a temporary collection account), does not give him the right to draw cheques on that bank. Cheques need not be paid by the banker unless the customer has at the bank an account of the type against which cheques are usually drawn, and which contains funds withdrawable *on demand*; *i.e.*, a *current* or *drawing* account. The existence of a credit balance on a current account gives the customer a right to issue cheques although the matter may not have been mentioned when the account was opened. But, in the absence of specific agreement to the contrary, the customer's right to draw cheques against funds in his banker's hands does not apply to funds on *deposit* or *savings* account, whether repayable on demand or after notice, for, apart from the question of notice, it is in such cases ordinarily stipulated that "Personal application must be made and the deposit account book produced at the bank when any money is withdrawn".

Nevertheless, a banker would rarely refuse payment of a cheque drawn by a customer with ample funds on deposit, for, even if the amount were not debited to the deposit account, the banker would be reasonably safe in granting a temporary overdraft on current account and in thereafter requesting the customer to make the necessary transfer from deposit to current account. Some provincial branches (particularly in the north of England) allow customers to draw cheques against deposit accounts without any previous arrangement, although in London it is not usual to permit such withdrawals.

### The Customer must have Funds at his Disposal

Even where the customer has a *current* account, the banker is under no obligation to pay cheques if payment is not warranted by the state of the account. But, since a banker may so easily be held liable for damage to his customer's credit, he should ensure that the dishonour of a cheque is justified before he refuses payment. He should make certain that all credits paid in by or for the customer have been duly entered in his account, and that the balance is accurately shown. In non-mechanized branches, the Dr. and Cr. columns of the ledger account should be short cast and the balance checked, in case there is any inaccuracy in the working.

If the customer has more than one account in the same right, the banker should ascertain whether the combined balance on all the accounts will justify the payment; if so, a banker would usually pay the cheque in reliance that the customer would make the necessary provision to cover it. The banker is not bound to enquire whether the customer has funds available at any other branch of the bank, nor need he have regard to the fact that credits of which he has not had advice may have been paid in at another branch.

On the other hand, if there is an express arrangement that an agreed credit balance shall be maintained by the customer as cover for an advance on another account, the banker can reserve that balance before deciding whether or not the customer has sufficient funds on his account to meet a cheque. Again, if the customer has instructed the banker to reserve certain funds or credits paid in to meet specified cheques, the banker must not apply those funds in payment of any other cheques, though this practice is strongly discouraged.

The famous *Gordon Case* (*Capital and Counties Bank v. Gordon*, 1903) left some doubt as to whether a banker who had credited as cash the amount of items paid in by a customer for collection was entitled to refuse payment of cheques drawn against such credits and presented before the proceeds of the credits were received. In the later case of *Underwood v. Barclays Bank*, 1924, however, the Court of Appeal made it clear that, in the absence of an express or implied agreement giving the customer a right to draw cheques against uncleared items, a banker is entitled to return such cheques with the answer "Effects not cleared".

As a rule, only customers known to be financially weak are not allowed to draw against uncleared funds. Cheques of good customers are usually paid without question.

A customer need not have a *credit* balance in order that his cheques should be paid. The issue of a cheque when no funds are available is tantamount to making an application for an overdraft, and, if the banker chooses to grant the accommodation, he can



pay the cheque and rely on his customer to make the necessary arrangements to meet it. Furthermore, if there is an agreement that the customer may overdraw up to a certain limit, the banker must not dishonour cheques issued in reliance on such an arrangement without first giving the customer reasonable notice that he wishes to terminate it. Subject to any agreement to the contrary, such notice may be given at any time, and, once it has been given, the banker's only duty is to pay cheques drawn by the customer, before receipt of the notice, up to the agreed overdraft limit.

Cheques returned on account of insufficiency of funds are usually marked "Refer to drawer". The answer "Not sufficient funds" should not be used, as it may be regarded as unnecessarily divulging the state of the customer's account.

Care should be taken in returning cheques marked "No Account", for, if it subsequently transpires that a mistake has been made by the banker, the drawer may be awarded substantial damages.

The holder has no legal right to demand a written answer from the drawee banker on an unpaid cheque, although it is the invariable practice of bankers to give such an answer, and, by the rules of the Clearing House, a written answer *in words* must be given on any cheque returned after presentment through the Clearing.

### **Cheques must be Signed by the Customer**

A banker must pay out his customer's money only against a mandate issued or authorized by the customer, *i.e.*, every cheque paid by the banker must be signed by the drawer or by his authorized agent.

To protect himself, the banker should ensure that the signature on each cheque corresponds with that of the customer in the banker's Signature Index; if there is any discrepancy, the cheque should be returned marked "Signature differs". Cheques drawn on behalf of impersonal customers (including companies, local authorities, etc.) must be signed in accordance with the instructions given to the banker in the relative mandate, otherwise they should be returned with some such answer as "Signature differs", "Signature incomplete", or "Secretary's signature required".

A banker who pays a cheque bearing a signature that does not agree with his mandate, or a cheque on which the drawer's signature is forged, will usually not be entitled to debit the amount to his customer.

Only in very exceptional cases can a customer be charged with a cheque bearing a forged or unauthorized signature, *e.g.*, where the banker can show that the customer, by his actions, has so misled the banker as to cause him to pay a cheque that would otherwise have been refused; or where the customer has in some way induced

the banker to think that the signature was genuine ; or where the customer, having received notice of the forgery of his signature to a cheque, does not at once take steps to warn the banker, whose position is consequently prejudiced by subsequent payment of the cheque.

In such circumstances, if the banker suffers injury by reason of any action or inaction of his customer in regard to a forgery, the customer is "*estopped*", or precluded, from denying that the forged signature is his signature. But this principle will not apply if the position of the bank is not directly prejudiced by the customer's action, or if the customer maintains silence at the request of the bank, *e.g.*, to protect one of the bank's servants who was responsible for the forgery.

A banker can debit his customer with a cheque bearing an *unauthorized* signature if the customer has expressly or impliedly ratified the signature, and is consequently estopped from denying its validity, *e.g.*, when he has not objected to his account being debited over a period with cheques drawn by a person with no authority to sign on his behalf.

Whether or not a banker is entitled to debit his customer with a cheque on which the customer's signature is forged or unauthorized, he is entitled to a refund of the money from the person who obtained the money on an instrument which is a forgery.

### Alteration of the Sum Payable.

The requisite that a cheque must be signed by the customer implies that any material alteration of the cheque must be authenticated by his signature or initials, so a banker who pays a cheque bearing an *apparent* material alteration that is not so confirmed may be unable to debit the customer's account.

The position is not so clear in cases where a cheque bears a *non-apparent* material alteration. By s. 64 (see p. 114), a non-apparent material alteration on the face of a cheque will avoid the instrument as against the drawer unless (a) he has himself made, authorized or assented to the alteration, or (b) the altered cheque is in the hands of a holder in due course, who can enforce payment of the cheque according to its original tenor. Hence, a banker who pays a cheque bearing a *non-apparent material* alteration made without the drawer's consent to anyone other than a holder in due course cannot usually debit the drawer with the amount of the cheque.

In *London Joint Stock Bank v. MacMillan and Arthur*, 1918, however, it was held that a banker was entitled to debit his customer with a cheque bearing a *non-apparent* alteration of the amount, *if the customer by his negligence in drawing the cheque had facilitated the alteration*. In this case, a clerk of the firm MacMillan and Arthur presented for signature to one of the partners a cheque

which he had prepared ostensibly for £2, but with spaces left before and after the figure 2 and with no amount written in the body of the instrument. The clerk obtained the partner's signature, and then altered the amount to £120. The alteration not being apparent, he obtained payment of £120 from the bank and absconded.

The firm maintained that the cheque bore an unauthorized material alteration and could not be debited to their account. But in giving judgment in favour of the bank, the judge said: "A cheque drawn by the customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care to prevent the banker being misled. If he draws the cheque in a manner that facilitates fraud, he is guilty of a breach of duty between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty . . . The customer is bound to take usual and proper precautions to prevent forgery."

On the other hand, in *Slingsby and others v. District Bank, Ltd.*, 1931, the drawer left a space after the name of the payee "X" and another name was fraudulently added, making the cheque payable to "X per Y". Payment was obtained on the indorsement of "Y", but it was held that such an alteration could not have been anticipated by the drawer and that he could not therefore be held guilty of negligence. Hence the bank could not debit the drawer's account.

Drawers should be advised to take precautions against a repetition of this fraud by ensuring that no blank space is left after the payee's name.

### Determination of a Banker's Obligation to Pay

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

- (1) Countermand of payment.
- (2) Notice of the customer's death.

Apart from the Act the banker's authority is determined also by—

- (3) Notice of the customer's insanity.
- (4) Notice of the presentation of a bankruptcy petition against the customer; the banker may also refuse payment of cheques payable to third persons if he has received notice that the customer has committed an act of bankruptcy. In the case of a registered company, the obligation is terminated by the presentation of a petition for winding-up or by the passing of a resolution to wind up.
- (5) Notice that the customer is an undischarged bankrupt.
- (6) Service upon the banker of a garnishee order (see Chapter 4), or of any injunction or similar order from the Court prohibiting transactions upon the account.

- (7) Notice of an assignment by the customer of the credit balance upon his account.
- (8) In the case of trust accounts, notice that the customer intends to apply the funds in breach of the trust, and
- (9) Notice of any defect in the title of the person presenting the cheque.

### Countermand of Payment by the Customer

To justify his banker's refusal to pay his cheque, the customer's "stop" must be expressly communicated to the banker and be authenticated by the customer's signature or the signature of any other person authorized to sign cheques on the account.

A "stop" may be registered by one of several partners or executors against a cheque drawn by one, some, or all of the persons so associated, *e.g.*, one partner may stop a cheque drawn by any other or others. If cheques are to be signed by any director of a company, a countermand of payment is effective if signed by any director or directors.

Except for such special cases, only the person who draws a cheque is entitled to stop payment. Hence, if the drawee banker is advised by the true owner of a cheque that it has been lost or stolen, he should at once advise the drawer, or request the true owner to do so, so that the drawer's instructions to stop payment may be obtained. If the cheque is presented in the meantime, it should be returned with the answer: "Confirmation of drawer's mandate required".

The drawee-banker should not stop a cheque in reliance on instructions communicated by telephone or by an unauthenticated telegram, unless he is certain that the instructions emanate from the drawer or from his known agent. But he should not ignore instructions that are not authenticated, and, if there is doubt, the best course is to postpone payment pending written confirmation of the stop by the drawer, in which case a suitable answer is: "Payment countermanded by telegram (or telephone) and postponed pending confirmation".

A customer who wishes to stop payment of a cheque must provide sufficient details to enable the banker to identify the cheque beyond all reasonable doubt. In *Hilton v. Westminster Bank, Ltd.*, 1926, it was held that the bank was not responsible for having paid a cheque which the drawer claimed to have stopped but had described by the wrong number.

If a banker pays a cheque payment of which has been effectively countermanded, he cannot debit the amount to his customer or recover from the person who received the money unless the recipient acted without good faith or had no title.

A cheque cannot be stopped by the drawer after it has been paid. Where the cheque is presented *over the counter* by the holder

or by a collecting banker, the cheque is paid as soon as the money is handed over by the paying banker.

When a cheque is presented *through the clearing*, the paying banker has up to the close of business\* in which to pay or return the cheque, and the cheque is not paid until the last moment when he can return it, even though it may have been debited to the drawer's account. The drawer has the right to countermand payment up to the bank's closing time, but if the banker has intimated to the presenting bank that the cheque is paid, payment is irrevocable as soon as such advice is given, and thereafter the drawer has no right to countermand payment.

When the cheque is *paid in by another customer to his credit*, it is not paid merely because the banker has credited the cheque to the one account and debited it to the drawer's account. Such a credit is not effective until it has been communicated to the customer, as by sending him advice of the credit or by handing him his pass book showing the credit, or until the close of business on the day following that on which the cheque is paid in, whichever occurs first. Until such time, the drawer has the right to countermand payment, as the cheque is not irrevocably paid.

### Notice of the Drawer's Death, Insanity, or Bankruptcy

Notice of the customer's death, bankruptcy, or insanity, justifying a banker's refusal to pay cheques, may be either express or constructive. *Constructive* notice is usually a question of fact. Although a banker cannot be expected to act on unconfirmed rumours, he cannot safely disregard information that is reasonably to be regarded as reliable.

Difficulties rarely arise in the case of death or insanity of a customer, and, although a banker should refuse payment of cheques presented after he has received notice of such events, he is entitled to debit the customer with cheques presented and paid before such information is received.

A banker who hears that a customer has committed an *act of bankruptcy* must act carefully in paying the customer's cheques, for, in certain cases, if the customer is ultimately made bankrupt, the banker may have to refund the amount of the cheques to the trustee in bankruptcy.

There are three stages preliminary to the adjudication of a debtor as a bankrupt. These are : (a) the commission by him of an act of bankruptcy ; (b) the presentation of a bankruptcy petition ; and (c) the making of a receiving order.

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\* Because of the delayed posting system and working difficulties arising out of the war, it has become the practice of the banks to accept returns sent off *on the day after presentation*, though advice is usually sent to the collecting banker on the day of presentation if a cheque is not yet paid.

**ACT OF BANKRUPTCY.**—The Bankruptcy Act, 1914, specifies eight acts of bankruptcy upon any one of which a bankruptcy petition against a debtor may be based, *e.g.*, a formal declaration by the debtor that he cannot pay his debts or his departure from the country with the intention of defeating his creditors. An act of bankruptcy is "available" (*i.e.*, as the basis of a bankruptcy petition) for a period of three months from its commission.

The position of the banker between the commission of an act of bankruptcy and receipt of notice of the presentation of a petition is by no means clear. It is considered, however, that the banker is protected if he pays cheques drawn by the customer *in his own favour*, even if he *has notice* of the act of bankruptcy, but that he has no such protection in the case of cheques drawn by the customer in favour of *third persons* (other than the customer's assignee), even if he is *without notice* of the act of bankruptcy.

**NOTICE OF PRESENTATION OF A BANKRUPTCY PETITION.**—A banker who receives notice that a *bankruptcy petition* has been presented against his customer should not pay *any* cheques drawn by the customer. But the presentation of a petition does not affect the banker unless and until he has notice thereof.

**RECEIVING ORDER.**—The banker's duty to pay cheques is determined by the making of a receiving order against his customer, and he is liable to the trustee for all moneys paid on account of his customer after such an order has been made, whether he had notice of the order or not. The only exception to this rule is that, where advertisement of the receiving order has for any reason been postponed and the banker has not received notice from any other source, the trustee can recover from the banker only so far as it is not reasonably practicable for the trustee to recover from the persons to whom the money has been paid—*Bankruptcy Amendment Act, 1926*.

The foregoing applies to *credit* accounts. Where the account is *overdrawn*, all operations thereon should cease upon notice of an act of bankruptcy, or of the presentation of a petition, or of the making of a receiving order.

A banker who discovers that one of his customers is an *undischarged bankrupt* is required by the Bankruptcy Act, 1914, to give notice to the trustee or to the Board of Trade of the existence of the account, and he may not make any payments out of the account without instructions from the Court or the trustee, unless, at the end of one month from the time when he gave the notice, he has received no instructions from the Court or the trustee.

The position is similar in the case of the winding-up of a limited company; no cheques should be paid by a banker who has received notice of the commencement of the winding-up.

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Cheques refused payment by reason of the actual or impending bankruptcy of a customer or of the winding up of a company should be marked "Refer to Drawer".

### Assignment of a Credit Balance

As the credit balance on a current account ceases to belong to the customer when he assigns it to a third party, and gives due notice thereof to the banker, cheques drawn by the customer against such a balance must be returned with a suitable answer, such as "Refer to Drawer".

The fact that the balance belongs to the assignee gives the latter no right to draw cheques against the amount unless the banker agrees to accept him as a customer, in which case the balance assigned should be transferred to a new account in the name of the assignee.

Although a customer may assign his bank balance to a third party, s. 53 (1) of the Bills of Exchange Act, 1882, provides that a bill of exchange (which includes a cheque) does not, except in Scotland, operate as an assignment of funds in the hands of the drawee. Hence, if a cheque is dishonoured because the balance on the drawer's account is insufficient to meet it, the holder, in England, has no claim to that balance, though, in Scotland, he would have such a claim.

A banker must not so divulge the state of a customer's account as to allow the holder of a cheque to pay in funds to the drawer's credit sufficient to bring the available balance up to the amount necessary to meet the cheque. If he does this, the banker runs some risk of liability for damages for wrongfully disclosing the state of the customer's account. On the other hand, if the banker makes no disclosure but the payee learns of the state of the account from another source and tenders for credit of the account an amount sufficient to make up the balance, then, other things being in order, the cheque may be paid.

The fact that one cheque is dishonoured because the customer's balance is insufficient to meet it does not justify the banker in refusing to pay a subsequent cheque covered by the balance. But difficulty may arise if several cheques are presented simultaneously and the available balance is sufficient to cover only one or some of them. Apparently the banker incurs no liability if in such circumstances he refuses to pay all the cheques, but, where the amounts of the cheques are not equal, he would probably pay the largest cheque covered by the balance. If the balance is sufficient to pay only one of two cheques of equal amount presented simultaneously, the banker may pay either of them.

## Knowledge of an Intended Breach of Trust

A banker transacting business with trustees may render himself liable if he is privy to any transaction that involves a breach of trust. He must therefore refuse payment of cheques drawn on a trust account if he has any reason to believe that the drawer is committing a breach of trust in withdrawing the funds, *e.g.*, where the banker can reasonably be presumed to know, either from the heading of the account or otherwise, that the money deposited therein is held by the drawer on trust. But this does not imply that the banker must query every cheque drawn; he is liable only if the circumstances are such as to put any reasonable man on inquiry.

If a customer has two accounts, one private and the other fiduciary, as may arise in the case of a treasurer to a local authority, the banker should not permit transfers from the fiduciary account to the private account unless he has good reason to believe that they are in order.

## Defect in the Holder's Title

A banker must not pay a cheque of his customer if he has reason to believe, or can reasonably be presumed to know, that the presenter has no right or title to it, *e.g.*, where the rightful owner of a cheque advises the banker of its loss or theft. In such a case, the banker incurs no liability, either to the holder or to the drawer, if he postpones payment pending the drawer's confirmation.

As to the holder, there is no privity of contract between him and the banker, so that he has no right to enforce payment against the banker even if he has an absolute title to the instrument, *e.g.*, even if he is a *bona fide* holder for value of a cheque drawn payable to bearer. In regard to the drawer, he could not claim that his credit was damaged by the postponement of payment. But it must be remembered that the holder in due course of a lost or stolen bearer cheque has a good title against all the world except the drawee banker and is, in fact, the true owner, so that the drawer would ultimately have to pay him.

## Cheques must be Duly Presented at the Proper Place

The banker is under no obligation to pay his customer's cheques unless they are presented at the branch where the customer's account is kept, during recognized business hours, for, by s. 45, a bill (including a cheque) must be presented for payment at a reasonable hour on a business day at the proper place of payment, *i.e.*, the address of the bank given on the cheque.

The provision in s. 45 (8) that presentment through the Post Office is sufficient, where authorized by agreement or usage, legalizes



## THE PAYING BANKER

the banking practice of presenting cheques through the post. But the presentment of a cheque through the post by the *holder* (other than a banker) with a request for cash in exchange would not be a presentment sanctioned by usage or custom. Payment of a cheque presented by post should not be made unless presentment is made by the *drawer* himself or a banker.

When the holder of a cheque presents it for payment, he must deliver it up to the paying banker [s. 52 (4)], who is entitled to retain the paid cheque as a voucher evidencing the payment on behalf of his customer, though it is usual for bankers to hand all paid cheques to the customer with his pass-book.

## Ante-dated Cheques

As s. 13 (2) provides that a bill (including a cheque) is not invalid by reason only that it is ante-dated, the fact that the drawer dates a cheque several days before its issue does not affect its validity. But if a cheque is negotiated on a date considerably later than that which it bears, a holder will presumably be affected by prior defects of title, since the cheque would on the face of it appear to be overdue at the time of negotiation.

From the banker's point of view, the ante-dating of a cheque is of importance only in connection with the banking practice of regarding as "stale" for purpose of *payment* cheques not presented for some considerable time after their date. The custom of bankers in this respect varies. Most bankers return cheques that have been outstanding for more than six months after the date of drawing.

## Post-dated Cheques

Although the Act states that a cheque is not invalid merely because it is post-dated, a banker should return, with the answer "Post-dated", any cheque bearing a date after that on which it is presented for payment.

The main reason for this is that a post-dated cheque must not be debited to the drawer's account until the date written thereon, for it is to be presumed that his intention was that the cheque should not be paid until that date. Hence, a banker who pays a post-dated cheque before its date is regarded as disobeying his customer's mandate, and must stand any loss that results from his action. For example, if such a cheque is stopped by the customer before its date, or if the cheque is lost and is paid before its date to the finder or to a thief, the banker will not be entitled to debit his customer. Even if the cheque is paid before its date to the payee, the drawer may refuse to have his account debited.

There is also the possibility that the banker may render himself liable to an action for injuring his customer's credit, if, by reason of the payment of such a cheque, the customer's balance is depleted

and the banker is compelled, through lack of funds, to dishonour cheques subsequently presented.

A cheque dated on a *Sunday* must not be paid until the following Monday, and any such cheque presented on the Saturday should be returned marked "Post-dated".

It is sometimes stated that, although a post-dated cheque is recognized by the Act as valid, it is to all intents and purposes not payable *on demand*, but is strictly a bill of exchange payable at a determinable future time, and, if dated more than three days after its issue, should properly bear an *ad valorem* stamp, the absence of which renders the drawer liable to a penalty under the Stamp Act. But the fact that a post-dated cheque is regarded as insufficiently stamped would not affect any right of action on the instrument, for such action could not be commenced until the arrival of the due date, when the cheque would be correctly stamped with the twopenny duty.

An authority to issue *cheques* (given, for instance, to a partner in a non-trading firm) does not extend to the issue of post-dated cheques, since such instruments are, in effect, bills of exchange payable at a future date.

### Cheques must be in Legal Form

A cheque should not be paid unless it conforms to the "requirements as to form" already discussed. It must be clear and free from ambiguity, embodying in plain, unmistakable terms the unconditional order of the customer to the banker to pay on demand a sum certain in money; it must be due for payment, *i.e.*, not post-dated, at the time of presentment; if it is payable to order, it must purport to be indorsed by the payee and all *subsequent indorsers*; and it must be stamped.

The banker has a right to insist that cheques shall be drawn in such a manner as to leave him no doubt of what he is required by the customer to do, and he is entitled to refuse payment of an order for payment that is not a cheque, *e.g.*, an instrument that requires payment to be made only on the *completion* of an attached receipt.

But a banker who has been accustomed to pay irregularly drawn documents must not discontinue to do so without giving reasonable notice of his intention to the customer.

### Proper Indorsement Essential: Payment in Due Course

Whether or not a cheque is properly indorsed is a question of fact to be determined by the circumstances of each case in accordance with the recognized principles relating to indorsements considered in Chapter 14. As is there stated, a paying banker must obtain for his customer a good discharge for all cheques paid by him.

While a paying banker is responsible for seeing that the indorsements on cheques are technically correct and apparently in order, he cannot reasonably be expected to accept responsibility for their *authenticity*, since he cannot possibly know the signature of every holder through whose hands a cheque may pass; nevertheless, a cheque is not discharged by payment in due course unless it is paid to a *holder*, for by s. 59 (1) :—

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

As a person who holds a cheque or bill by or through a forged indorsement is not a "holder", the question naturally arises: What is the banker's position if he pays away his customer's money to a person who is not a holder of the cheque because it bears a forged indorsement?

### The Protection of the Paying Banker

Fortunately, the difficulties with which banks are faced by reason of forged or unauthorized indorsements on cheques have been recognized, and statutory protection in this regard, as well as in regard to unauthorized alterations of crossings, is afforded to them by ss. 60, 79 and 80 of the Act.

S. 60 thus protects the paying banker against forged or unauthorized indorsements on cheques paid by him :—

60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

While this section applies generally to *all* cheques, whether *crossed* or *uncrossed*, the Act imposes on the paying banker certain additional duties in regard to the payment of *crossed* cheques.

S. 79 provides that a paying banker is liable to the true owner of a crossed cheque for any loss sustained by the latter if the banker (a) pays a crossed cheque otherwise than to another banker, or, if it is crossed specially, otherwise than to the banker named in the crossing, or his agent for collection being a banker; or (b) does not refuse payment of a cheque crossed to more than one banker. On the other hand, the paying banker is protected by s. 79 against the claims of the true owner, if, in good faith and without negligence, he pays, either to someone other than a banker, or to someone other than the banker named, a cheque that bears a non-apparent or

obliterated crossing, or a crossing that has been added to or altered otherwise than is authorized by the Act, provided, in the latter case, that the alteration or addition is not apparent. The section further renders such a payment valid as against the drawer.

More general protection to the banker paying crossed cheques is afforded by s. 80 :—

80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

In brief, the paying banker is protected in respect of forged indorsements (a) on *uncrossed order* cheques, by s. 60, provided he pays in good faith and in the ordinary course of business; (b) on *crossed* cheques, by s. 60, provided he pays, in good faith and in the ordinary course of business, and by s. 80 if he pays in accordance with the crossing and without negligence.

If the banker brings himself within the requirements of these sections, the payment of the cheque is good so far as he is concerned, even though payment is made to or for a person who has no right to the instrument, or even though the cheque bears a forged indorsement. But, to obtain the protection, the banker must strictly comply with all the provisions of the particular section that applies in the circumstances.

### The Meaning of "Good Faith"

Both s. 60 and s. 80 require payment to be made in *good faith*, a matter that can be decided only from the facts of each case. According to s. 90, "A thing is deemed to be done in good faith, within the meaning of this Act, where it is, in fact, done honestly, whether it is done negligently or not". It is difficult to conceive conditions involving absence of good faith on the part of a joint-stock bank with relation to paying cheques, though there may be lack of good faith on the part of a bank's employees; so that a bank might be liable under this section if a cheque were paid by a cashier who had good reason to doubt the genuineness of an indorsement.

### "The Ordinary Course of Business"

Ss. 79 and 80 protect the banker only if he pays "without negligence," whilst s. 60 applies only if payment is made "in the ordinary course of business". In practice, the terms mean much the same thing: a banker who acts negligently is not following the usual course of business; whilst a banker who does not follow the usual course of business is acting negligently in his customer's interests. As to what constitutes negligence and acting outside the

usual course of business are questions of fact that have to be decided according to the circumstances of each case. (See also p. 183.)

A paying banker would unquestionably lose the protection of s. 60 if he paid a cheque out of his usual business hours, and *possibly* also if, without reasonable inquiry, he paid a cheque for a large amount to a person who was obviously unlikely to be entitled to such a document, *e.g.*, a tramp. Again, it would be both negligent and not in accordance with the ordinary course of business if a banker omitted to examine the indorsements on a cheque before paying it, or if he failed to examine them with reasonable care.

Although cheques presented otherwise than through the clearing or by post must be paid during usual business hours, this does not mean that a bank is not allowed a reasonable margin of time, after the advertised closing hour, in which to pay a cheque, *e.g.*, where the presenter enters the bank premises before closing time.

Payment of a cheque in due course and in the ordinary course of business need not be in *cash*; a cheque may be duly paid by giving the holder, with his consent, the banker's own draft or cheque in full discharge, or merely by entries in the banker's books (*i.e.*, as between one customer and another, or as between the paying banker and the collecting banker).

Payment of an *uncrossed* cheque, which either originally or by indorsement is payable *to bearer*, is valid even though the person in possession of the cheque is not the true owner, either because he has found or stolen the instrument, or because he has taken it from a finder or thief knowing it to have been found or stolen, provided in both cases that the banker had no knowledge of the presenter's defective title.

A banker who is asked to pay over the counter a cheque payable to, or indorsed in favour of, a company, and bearing what appears to be a regular indorsement by the company, is not justified in refusing payment merely because it is unusual for a company to obtain payment of its cheques in this way. As the cheque is indorsed in blank, the banker is entitled to pay the bearer, whether or not he is known to be an agent of the company. Nevertheless, a banker would if possible make discreet inquiries before paying in this manner a cheque for a large amount, except to a person known to be a responsible official of the company.

When payment is made in legal tender over the counter and there is no question of a mistake of fact *as between the banker and the recipient*, or of absence of good faith on the part of the recipient, the payment is complete and irrevocable as soon as the recipient touches the money. Hence, if the banker finds, before the presenter leaves the bank premises, that the drawer's account does not justify the payment, or that he has overlooked a "stop" placed against the cheque, he cannot demand repayment of the money.

Payment in due course is also made when the banker sends legal tender currency or a draft by post in exchange for a cheque presented by the drawer or another banker through the post (s. 45). But this does not apply to the holder of a cheque as distinct from the drawer or another banker; any cheque presented for payment by post by a holder should be returned with the request that it should be presented by the holder in person or through a banker.

### Paying Crossed Cheques

Apart from his statutory liability to the true owner under s. 79, a banker who pays a crossed cheque to anyone other than a banker, or otherwise than in accordance with the crossing, is not acting without negligence within the meaning of s. 80. Moreover, as he does not pay in the ordinary course of business, he also loses the protection of s. 60, and so cannot debit his customer's account if the cheque bears a forged or unauthorized indorsement.

The paying banker should not pay a crossed cheque over the counter except to another banker.

### "Not Negotiable" and "A/c Payee Only"

The fact that a cheque is crossed "Not negotiable" and bears evidence, in the form of more than one indorsement, that it has been negotiated or transferred, does not deprive the paying banker of the protection of s. 80 on the ground of negligence. A "not negotiable" crossing does not make the cheque *not transferable*, and no duty is imposed on the paying banker to inquire whether a valid title was passed when the cheque was transferred.

The same position arises when the cheque bears an addition to a crossing such as "Account Payee" or "Account Payee only" or "Account A.B.", with or without the words "Not negotiable". Such additions do not prevent payment in due course of a cheque even though it bears several indorsements.

As a rule, bankers refuse to *collect* such cheques except for the account of the payee, so that paying bankers are unlikely to be troubled with these points except in the case of cheques presented to them over the counter. (See p. 186.)

### "Not Transferable" Cheques

The position is different in the case of a cheque that is clearly and unmistakably intended to be "not transferable", e.g., when drawn payable to "John Brown *only*", or "John Brown, *not transferable*", with the word "Order" or "Bearer" crossed out and initialled by the drawer, and with or without the words "not transferable" written across the face.

As a cheque so drawn cannot be regarded as payable "to order", the paying banker has no protection under s. 60. If such

a cheque is crossed, the paying banker should take reasonable steps to ensure that the proceeds have actually reached the payee, otherwise he will lose the protection of s. 80 on the ground of negligence. Hence, a not-transferable cheque presented by another bank should be paid only if the collecting banker confirms that the money has been placed to the credit of the payee. Such a cheque presented over the counter should be paid only on proof that the presenter is the payee, or someone authorized to receive payment on his behalf. In no case should such a cheque be paid if it bears evidence that it has been transferred, otherwise the paying banker may be liable to the true owner and be unable to debit his customer.

### Extent of the Paying Banker's Liability

If the paying banker, by paying a cheque bearing a forged indorsement otherwise than in good faith and without negligence or in the ordinary course of business, fails to bring himself within the protection of either s. 60 or s. 80, he cannot debit the amount to his customer, and, if the amount has been so debited, it must be refunded. Moreover, the banker is liable to the true owner of the cheque for "conversion" of his property, and will have to pay the amount to him.

CONVERSION implies interference or meddling with the goods of another in a way inconsistent with the owner's right of ownership, and occurs when goods (including bills, cheques and notes) are taken, used, or destroyed without the owner's agreement, or when some control inconsistent with the owner's right is exercised over them.

From a banker's point of view, possibly the most important aspect of conversion is that the wrong may be committed *in perfect innocence*, so that immunity from liability cannot be secured even by the exercise of the utmost care and skill. Moreover, the liability may exist even in the case of a person acting merely as an agent for another, for conversion is a *tort* that renders both agent and principal *personally* liable, although the person suing can recover damages only once.

A banker may, therefore, have acted quite innocently as an agent yet, if he can be shown to have converted the goods of another, he is liable to make good their value to the *true owner*.

The remedy of the true owner whose property has been converted is to sue the person responsible in an action for conversion, trover, or detinue of the property; if he succeeds, he is entitled to the return of the goods or to damages, in addition to the costs of the action. In the case of a negotiable instrument, such damages will be the face value of the instrument.

In an action for conversion of a negotiable instrument, it is usual for the true owner to join with his claim for conversion a

claim for "money had and received" to his use, in which case he is free to recover on either ground. The claim for "money had and received" against a person who had no knowledge of the rights of the true owner is based on an *implied* promise, which the law *imputes* to a person dealing with the money of another, to repay that money to the lawful owner when it is demanded.

### Banker's Liability for Conversion of Cheques and Bills

There are three cases in which a banker, in his dealings with cheques and bills, may render himself liable for conversion:—

1. *Paying a cheque or bill bearing a forged indorsement.* As payment of a cheque or bill to anyone who holds through a forgery is not a payment to the "holder", it is not a valid discharge of the instrument. But in respect of *cheques* the paying banker is safe if he can bring himself within the protection afforded by ss. 60 and 80 of the Act. He has, however, no such general protection in respect of *bills of exchange* other than cheques, although he is protected by s. 19 of the Stamp Act, 1853, and by s. 17 of the Revenue Act, 1883, in regard to conditional orders to pay, and by the Bills of Exchange Act (1882) Amendment Act, 1932, in regard to crossed bankers' drafts on demand. (See Chapter 22.)

2. *Collecting a cheque, bill of exchange, or promissory note bearing a forged indorsement, or in respect of which the customer has no title or a defective title.* So far as bills of exchange and promissory notes are concerned, the liability is absolute. But a banker collecting crossed cheques is protected by s. 82 (see Chapter 16), and in regard to certain documents other than cheques by s. 17 of the Revenue Act, 1883, and the Bills of Exchange Act (1882) Amendment Act, 1932. (See Chapter 22.)

3. *Taking for value a bill of exchange, cheque, or promissory note bearing a forged indorsement, or a cheque crossed "not negotiable" to which the transferor's title is void or defective.* A banker who takes such an instrument for value is not an agent and is, therefore, not protected either as a paying banker or as a collecting banker.

The banker's liability to the true owner in these respects exists quite independently of any right of recourse he may have against his customer.

It follows, therefore, that a banker may pay the amount of a cheque *twice*, once to the person presenting the cheque, and once to the true owner, though, having paid the true owner, the banker will usually be entitled to debit the drawer's account. Thus the ultimate result may be that he loses the amount of the cheque once, subject to his possible rights of recovery from the person to whom he paid the money.



## Marking Cheques as "Good" for Payment

A banker "marks" a cheque when he writes on it his signature or initials (accompanied, as a rule, by the word "Good"), to indicate that, at the time of the marking, he is willing to pay the cheque.

Such marking may be effected at the request either of another banker (e.g., when he wishes to ascertain whether a cheque presented too late for inclusion in the day's clearing will be paid) or of the drawer of the cheque (e.g., when he wishes to satisfy the payee that the cheque will be paid on presentment).

In any such case, the drawee banker can earmark sufficient funds of the drawer to meet the cheque when presented even if, by so doing, he has to dishonour other cheques of the drawer because they are not covered by the remaining balance, and even if the drawer, since the marking, has died, or become bankrupt or insane. A garnishee order does not attach funds that have been appropriated by the drawee banker to meet a marked cheque.

The drawer has no right to countermand payment of a marked cheque if the cheque has once left his possession.

The practice of marking cheques is so unsatisfactory from the banker's point of view that, in 1920, the Committee of London Clearing Bankers advised that it should be discontinued and most banks now refuse to mark cheques.

Nowadays, a banker who is requested by the drawer to mark one of his cheques will usually at once pay the cheque to the drawer's debit and either credit the amount to a sundry account to be debited when the cheque is presented, or issue against the cheque one of his own drafts on demand. Similarly, a banker who is asked by another banker to mark a cheque will, if possible, pay it and issue against it an agent's claim voucher for payment through the next clearing.

## Marking Clearing Cheques for Another Banker

Collecting bankers often ask paying bankers to mark certain cheques received too late in the day for presentment through the usual clearing channels. Such marking is legally recognized as an implied undertaking to pay on the part of the drawee banker. It constitutes a constructive payment entitling the banker to appropriate funds of the drawer to meet the cheque, and to return any cheques subsequently presented that would deplete the funds so appropriated.

## Marking Cheques for the Payee or Holder

In this country, bankers will not mark cheques at the request of the payee or of a subsequent holder.

## Advising "Fate" by Telegram or Telephone

A paying banker is sometimes asked by the collecting banker to send a message by telegram or telephone stating whether a given cheque will be paid on presentment.

The paying banker should exercise care in acceding to such a request, for, if he so far commits himself in replying as to be *bound* to honour the cheque on presentment, *e.g.*, by replying, "Yes, cheque will be paid", or "Yes, if in order", he must pay the cheque when presented (provided it is in order), even though the drawer may in the meantime have stopped payment, or have died, or become bankrupt or insane.

A promise to pay made by telegram or telephone is not a payment in the ordinary course of the paying banker's business sufficient to justify his debiting the drawer's account *in any event*, and he has no right to appropriate funds of the drawer to meet such a cheque. If he does so appropriate funds and has then to dishonour cheques subsequently presented, he may render himself liable for damage to his customer's credit. Moreover, the drawer has the right to stop payment of a cheque at any time before the expiration of the time within which the bank may pay or return it. Hence, the *only* safe procedure is for the paying banker to give a non-committal reply, *e.g.*, "Cheque would be paid if in our hands now and in order". Such an answer leaves it open to the banker to dishonour the cheque if circumstances make that necessary.

A similar non-committal statement should be made when a cheque that has been previously dishonoured is recalled either at the drawer's request, or because the paying banker, having received sufficient funds, wishes to protect his customer's credit by paying the cheque. A suitable intimation is "Cheque Reynolds would be paid if re-presented now and in order".

These remarks do not apply when the paying banker *at the drawer's request* advises a banker or holder by telephone or telegram that a cheque will be paid, for then the banker is entitled to appropriate funds of the drawer to meet the cheque on presentment.

The collecting banker may present a cheque *direct* by post and not through the usual clearing channels, with a request that the paying banker shall advise fate by telegram. In such a case, the paying banker should reply, "Cheque Reynolds paid" or "Cheque Reynolds unpaid", as the case may be. When once such advice of payment has been sent, the drawer cannot stop the cheque or refuse to have it debited to his account. If such a cheque is unpaid, it should be returned direct by post to the collecting banker with a confirmation of the telegram.

## Payment of Cheques under Advice

Customers often require arrangements to be made for them to cash cheques at another branch or at another bank. Provided the customer's credit permits, the banker will instruct his branch or the other bank to cash his customer's cheques up to a stated amount during any one day, week or month. Cheques so cashed are described as being "paid by order" or "paid under advice."

A bank paying by order a cheque drawn on another *branch of the same bank* is probably protected by s. 60, as the payment may be regarded as payment by the bank on which the cheque is drawn. But if a cheque *on another bank* is paid by order, the cashing bank obtains no protection under s. 60 in the event of the indorsement being forged or unauthorized.

## The Return of Unpaid Cheques

The Act lays down no rules as to how long a drawee-banker may retain a cheque before returning it unpaid, and the time available to the banker depends on the circumstances of each case and on the current banking practice. Normally, this is as stated below, but was somewhat modified to meet war-time conditions (see footnote, p. 193).

When a cheque is presented over the counter, the holder is entitled to be paid or to have payment refused *immediately*. But where the cheque is presented over the counter by another bank and notice of its fate is not required at once, it is customary to allow the drawee bank *until the close of business hours* on the same day to decide whether he will pay or return the cheque.

It is usually provided by the rules of local clearings that cheques presented through the clearings must be paid or returned on the day of receipt, and the same rule operates between the banks in the City of London in regard to cheques presented through the Town Clearing. By the Rules of the London Clearing House, unpaid Metropolitan and Country cheques must "be returned by post *on the day of presentation* direct to the bank or branch bank whose name and address are on the crossing".

When a cheque is presented *direct* through the post by a banker, the paying banker becomes also a collecting agent and, as such, may exercise his legal right to return unpaids in time to reach a presenting bank *in the same town* on the day following receipt, and to send an unpaid cheque off not later than the last post on the day following receipt if the presenting bank is in another town. In practice, such cheques are always returned on the day of receipt, and a paying banker holding a cheque over until the next day would, as a matter of courtesy, advise the presenting banker of the fact.

The same applies to cheques presented for payment by another customer of the same branch. But where a cheque is presented

through the post by a stranger, the banker should return it at once with a request that presentment be made either in person or through another bank.

### Payment of a Customer's Bills

Failing express or implied agreement with the customer to the contrary, a banker is under no obligation to pay a bill of exchange accepted payable at the bank by the customer, although such an acceptance is in itself a sufficient authority to the banker to pay the bill and to debit his customer with the amount. If the customer has no credit balance available, the banker may regard the acceptance of a bill domiciled with him as a request for an overdraft, and may charge the customer interest on the overdraft so created.

In paying a bill of exchange other than a cheque, the banker is outside the protection afforded by the Bills of Exchange Act, and cannot debit his customer if he pays out to a person claiming through a forged indorsement. In such an event, the bill is not discharged; the acceptor remains liable on the bill and the banker cannot debit him with the amount.

To safeguard themselves, bankers usually take from the customer an authority on a special form to pay bills domiciled with them, the authority embodying an undertaking by the customer to indemnify the bank if any such bill bears a forged indorsement.

Although the banker cannot debit the acceptor if he pays a bill bearing a forged indorsement, he can debit the acceptor with a bill on which the *drawer's* signature is forged. "The drawee of a bill is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument: and it is his act of acceptance which sends the bills forward for payment to the banker". (*Vagliano Bros. v. Bank of England*, 1891.)

The banker must, of course, verify the signature of the acceptor, for, if the drawee's signature turns out to be forged, the banker cannot debit his customer and must bear the loss himself, subject to the proviso, already discussed in connection with forged signatures on cheques (see *ante*; p. 162), that a customer will be estopped from denying the validity of his signature if he has induced the banker to rely on a signature that is forged or unauthorized.

A banker should not pay overdue bills without the authority of his customer, although he may be justified in doing so if he has sufficient funds in his hands, for payment in due course is defined in s. 59 (1) as "payment made *at or after maturity of the bill*".

A bill bearing a material alteration should not be paid unless the alteration is confirmed by the drawer, and if, after acceptance, a bill is fraudulently altered in respect of its amount, the acceptor will be held liable, *unless* the alteration is non-apparent and the

bill is paid to a holder in due course, when the banker can charge the acceptor with the original amount for which the bill was drawn.

### Bills of Exchange "to be Retired"

Bankers with whom bills are domiciled may be asked by their customers to pay the instruments (with the holder's consent) before they fall due, the instructions being given on a special "Bills to be Retired" form, signed by the customer.

Usually, payment of a bill before its date is made *under rebate*, i.e., the acceptor is allowed a deduction from the amount of the bill equal to the interest on that amount for the period the bill has still to run before maturity, the interest being usually calculated at  $\frac{1}{2}$  per cent. per annum above the current rate allowed on short deposits by London joint-stock banks.

A receipt in the following form is usually given by the holder on the back of the bill:—

Received payment of the within bill from the acceptor, *James Brown*,  
this 17th day of *September* 19 .., under rebate at  $3\frac{1}{2}$  per cent. per annum.

As a bill is not paid in due course until it is paid "at or after maturity" (s. 59), a retired bill is not discharged and must not be cancelled by the banker who pays it, unless he is instructed by the acceptor to do so.

## CHAPTER 16

### THE COLLECTING BANKER

THE term "Collecting Banker" is applied to a banker who collects the proceeds of cheques, bills, and other documents either on his own behalf, or on behalf of a customer or another banker. Unless he is collecting on his own behalf, the banker acts as an agent on behalf of a principal, and, as such, he incurs certain liabilities if he fails properly to discharge the duty entrusted to him. The extent of this duty will depend on the facts of each particular case and on the recognized practice in the circumstances, but a banker in any case is liable to his customer for any loss or damage that results from his omission to use reasonable care, skill, and diligence in the discharge of his duty as a collecting agent. Thus he is liable for delay in making presentment for payment, unless such delay is excused by the Act, or for omitting to present a bill at the proper place as defined in the Act.

In the absence of an indemnity or of any agreement to the contrary, the collecting banker is liable also for the negligence of

any agent or correspondent employed by him to collect bills and cheques paid in by his customer.

A banker collects cheques and bills *on his own behalf* when, for example, he collects cheques he has cashed over the counter, or cheques he has received in payment of debts due to him. In such cases, the banker is not responsible *as an agent* but must act with due diligence in discharging the duties of a *holder* as set out in the Act, otherwise he will lose his recourse against prior parties to the instruments collected.

A collecting banker has no duty towards the persons from whom the proceeds of bills and cheques are collected. So long as he acts in good faith and does not give any personal undertaking or make any misrepresentation concerning the instruments (or any documents attached thereto, *e.g.*, in the case of documentary bills), he incurs no responsibility to the presentees if the instruments or documents are not valid or in order.

### Collection of Cheques for a Customer

**UNCROSSED OR OPEN CHEQUES.**—In collecting *uncrossed* bearer or order cheques *for a customer*, a banker is afforded no protection, and, should such an instrument bear a forged indorsement, or, should the customer's title thereto prove void or defective, the banker is liable for converting the property of the true owner, although he *may* be able to debit the cheque to his customer.

If the customer for whom a banker collects an open cheque is a holder in due course, the banker cannot be liable to anyone, because he has collected the cheque for the true owner and cannot, therefore, be guilty of conversion.

A banker who collects an *uncrossed* order cheque *on his own behalf* is liable to the true owner only if the cheque bears a forged indorsement. Even then, he can enforce his rights against any indorser of the cheque who indorsed *after* the forgery, and also against his immediate transferor if that person, by reason of being a transferee by delivery, has not indorsed. If, however, there is no forgery but merely defective title on the part of the person from whom the banker took the cheque, the banker having given value (assuming he acts in good faith and without notice of the defect) is a holder in due course and can enforce payment against all prior parties.

**CROSSED CHEQUES.**—In regard to *crossed* cheques, whether payable to bearer or order, the collecting banker obtains statutory sufficiency from liability for conversion by s. 82, *viz.* :—

in s. 59. Where a banker in good faith and without negligence receives a bill for a customer of a cheque crossed generally or specially to the alteration and the customer has no title or a defective title thereto, the banker, if not incurring any liability to the true owner of the cheque by not having received such payment, cannot be held

The provisions of this section are further extended in the banker's favour by s. 1 of the Bills of Exchange (Crossed Cheques) Act, 1906, which reads:—

1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

This Act was passed to negative the effect of the decision in the Gordon Case (*Capital and Counties Bank v. Gordon*, 1903), in which it was decided that, by *crediting as cash* cheques paid in by a customer, a banker became a holder for value and was thereafter to be regarded as receiving payment *for himself* and not *for his customer*. The effect of the 1906 Act is further discussed on p. 188.

### Conditions which must be Fulfilled

To claim the protection of s. 82, the collecting banker must act strictly in accordance with its provisions.

First, he must act "*in good faith and without negligence*", and this applies to the *whole* transaction, from the receipt of the cheque from the customer to the receipt of the proceeds from the paying banker. Secondly, he must collect *for a customer*, and not for himself or for a person who is not a customer.

As it is to be presumed that banks do not act otherwise than in good faith in all their dealings, the question of good faith in relation to the collection of cheques is not very important, although a bank might be liable for absence of good faith on the part of any of its employees.

"Good faith" and "negligence" are not mutually exclusive terms, for s. 90 provides that a thing is deemed to be done in good faith within the meaning of the Act where it is in fact done honestly whether it is done negligently or not.

### What Constitutes "Negligence" ?

Although the question as to what constitutes negligence has to be decided on the circumstances of each case, the term is capable of a very wide interpretation, often to the detriment of the banker. Moreover, s. 82 imposes on the banker an implied duty *to the true owner* to avoid negligence, in spite of the general principles that a banker's duty is *to his customer* and to no other, and that, as a rule, there can be no negligence where there is no duty. When a collecting banker relies on the protection of s. 82, the burden of proving that he has acted "*without negligence*" is on him, since the true owner's case is complete as soon as conversion is proved *prima facie* against the banker.

In *Commissioners of Taxation v. English, Scottish and Australian Bank, Ltd.*, 1920, it was stated that "it is not a question of negligence

in opening an account, though the circumstances connected with the opening of an account may shed light on the question as to whether there was negligence in collecting the cheque—the test of negligence is whether the transaction of paying in a given cheque, coupled with the circumstances antecedent and present, were so out of the ordinary course that it ought to have aroused doubts in that banker's mind and caused him to make enquiry."

The following are circumstances where the action of a collecting bank has been regarded as sufficiently negligent to deprive him of the protection of s 82 :—

1. *Omission to verify the correctness of indorsements on cheques payable to order* The collecting banker must ensure that the indorsements on all cheques presented by him are technically correct and in accordance with the recognized practice. Thus, in *Bavins, junr., and Sims v. London & South Western Bank*, 1900, it was held that the collecting banker was negligent in not detecting that an indorsement and a signature to a receipt on a cheque did not correspond with the name of the payee.

2. *Omission to verify the existence of authority in the case of per procuration signatures if there are any circumstances connected with the transaction that should put the bank on inquiry.* Whenever the circumstances connected with the transaction appear suspicious, a banker must act with care in accepting for collection cheques bearing per procuration signatures. In particular, inquiry is called for if an agent draws cheques on behalf of his principal and pays them into his own account.

3. *Collecting for the private account of an official or agent a cheque made payable to his company or firm and indorsed by him as agent on its behalf.* This has been maintained as negligence in numerous cases, including *Hannan's Lake View Central, Ltd. v. Armstrong*, 1900; *A. L. Underwood v. Bank of Liverpool and Martins*, 1924; *Stewart v. Westminster Bank*, 1926.

4. *Accepting for a customer's private account cheques drawn "per pro." by him, or by him and another, on behalf of his firm and made payable either to himself or to another.* In *Morison v. London, County & Westminster Bank, Ltd.*, 1914 (decided, however, on other grounds), it was held that the bank was *prima facie* guilty of negligence in accepting for an employee's private account cheques drawn by him "per pro." on his firm's account, either at the same bank or at another bank, the cheques being made payable either to the firm or to the employee himself, and being indorsed by him in his own name or "per pro." the firm, as the cases required.

Similarly, in *Lloyds Bank v. Chartered Bank of India, Australia, & China*, 1928, the Chartered Bank was held guilty of negligence



in collecting for the private account of an employee of the plaintiff bank cheques drawn by *him and another* on the plaintiff's account in favour of the collecting bank.

5. *Collecting for a partner's private account cheques payable to the partnership.* A banker has no right to assume without inquiry that a partner is entitled to place to his own account cheques payable to the firm.

By the decision in *Guardians of St. John, Hampstead v. Barclays Bank, Ltd.*, 1923, it would appear that, where a person has an account in *his own name* (e.g., D. Stewart) and pays in cheques payable to a firm (e.g., D. Stewart & Co.), stating that he is trading under the firm name in question, the banker must endeavour to verify his statement.

As the customer, in such circumstances, must register the firm name under the *Registration of Business Names Act, 1916*, the banker should attempt to satisfy himself as to the regularity of the transaction *either* by requesting the customer to submit for inspection his certificate of registration under that Act, *or* by searching the Register for the necessary information.

6. *Placing to a customer's private account cheques payable to him in an official or fiduciary capacity, e.g.,* cheques payable to "Thomas Robinson, Collector of Taxes", "The Collector of Taxes", "The Collector of Inland Revenue", "Borough Rates", "Water Rates", etc. In no circumstances should cheques so drawn be accepted for a private account, but the mere fact that a person is a public official, or that he acts in a fiduciary capacity which involves his having other people's money in his hands, does not of itself put the banker on inquiry in regard to other cheques paid in to the official's private account.

7. *Omission to obtain and follow up a reference from a new customer, and omission to make other reasonable enquiries concerning a new customer's work and/or business.* In *Ladbroke v. Todd*, 1914, the bank was regarded as negligent for not having obtained a reference, while in *Turner v. London and Provincial Bank*, 1903, the bank was regarded as negligent for not *taking up* a reference given by a new customer.

The liability of a collecting bank was much extended in consequence of the decision in *Lloyds Bank, Ltd. v. E. B. Savory & Co.*, 1932, that the bank was negligent in not ascertaining the *nature of the employment*, in one case, of a customer, and, in another case, of the husband of a customer. In addition, the bank was considered to have acted negligently in not ascertaining the name of the employers of the new customers. As a result, banks now make the fullest inquiries as to the nature of the employment and the names of the employers of a prospective customer.

8. *Collecting a cheque crossed "Account Payee" for other than the payee named.* Although the words "Account Payee" or "Account payee only" or "Account James Brown, etc.", have no statutory recognition, and do not impair the negotiability of a cheque, a banker who disregards them and, without making reasonable inquiries, collects a cheque bearing the words for some one other than the named payee, is likely to lose the protection of s. 82 on the ground of negligence.

In *Akrokerri (Ashanti) Mines, Ltd. v. Economic Bank*, 1904, the Court considered that such an addition to a crossing on the face of a cheque constituted a direction to the receiving banker as to how the proceeds of the cheque were to be dealt with *after receipt*. This implies that a cheque so marked should generally be taken and collected only for the named payee, and would apply as much in the case of a cheque payable to a named payee or *bearer*, as in the case of a cheque payable to order.

This view was confirmed in *Underwood v. Bank of Liverpool and Martins*, 1924, where the judge stated: "While this addition (*i.e.*, "Account Payee only") does not affect the negotiability of an order or bearer cheque, I agree with the view that, when such a cheque is paid into the account of a person who is not the payee, the bank is put on inquiry."

But the bank is not expected to make inquiries *unless it is in a position to do so*. So, where a London bank acting as clearing agent for a foreign correspondent collected a cheque crossed "A/c payee only" and bearing several indorsements, the London bank was not expected to inquire into the validity of the foreign negotiations. (*Importers Co., Ltd. v. Westminster Bank, Ltd.*, 1927.)

9. *Collecting cheques paid in at one branch for a customer who had an account at another branch of the same bank without communicating the facts to the customer's branch.* In *Lloyds Bank, Ltd. v. E. B. Savory & Co.*, 1932, crossed bearer cheques drawn in favour of third parties by Savory & Co. were misappropriated by two of the firm's employees, A and B, and were paid in by them to one of the branches of Lloyds Bank for collection and credit of accounts at other branches of the bank. A paid in some of the cheques for collection and credit of *his own account* at another branch of the bank, while B paid in some of the cheques for collection and credit of *his wife's account* at a third branch of the bank. No inquiries were made by the branch which took in the credits, and the proceeds of the cheques were duly credited to the respective accounts at the branches where the accounts were kept.

Savory & Co. sued the bank for conversion, and it was held that, as the branch receiving the credits had failed to communicate

all the facts in their possession to the branches at which the accounts were kept, the branches had been negligent in dividing their knowledge. Had the facts been communicated to the branches where the customer's accounts were kept, those branches might have been put on inquiry and the frauds discovered.

10. *Failing to make inquiries when the circumstances are suspicious or unusual.* In the majority of the foregoing cases, the negligence lay, not in collecting the cheques in the given circumstances, but in failing to make inquiries where the conditions were such as to require them, or in failing to take all the precautions that experience had shown to be desirable or that the Courts had held to be necessary.

Hence, a banker should refuse to collect any cheque if the circumstances are suspicious or unusual, and he is not satisfied as to his customer's title. Whether any particular circumstances are to be regarded as unusual depends on current banking practice. Thus it is unusual for a cheque payable to a limited company to be paid into an individual's private account. Though the cheque may bear what appears to be a genuine indorsement by the company, it is thought that the banker should make careful inquiries into the customer's title.\*

Some authorities go so far as to suggest that inquiries should be made if a cheque payable to one limited company is paid into the account of another company. It is submitted, however, that this goes beyond the banker's duty to the true owner.

### Estoppel as against the True Owner

In certain circumstances, a banker may escape liability for negligence under s. 82 on the ground that his acts or omissions have been induced or encouraged by the action or inaction of the true owner, who is thereby estopped from succeeding against the bank for conversion of his property. Thus in *Morison v. London, County & Westminster Bank*, 1914, an employee, Abbott, had for years fraudulently paid into his private account cheques drawn by him "per pro." on behalf of his firm, Bruce Morison & Co. The employer, Morison, had actual knowledge of some of the misappropriations, but took no steps to warn the bank, or to complain of the transactions, although he had from time to time received his pass book in which the cheques were entered. The Court held that the plaintiff (*i.e.*, the true owner) by his conduct had adopted the transactions and was, therefore, not entitled to succeed against the bank, in spite of the fact that it was technically guilty of conversion and of negligence.

\* See Rayner Goddard, K.C., in the *Journal of the Institute of Bankers*, vol. liii, page 76.—It would not be sufficient to require the customer to obtain a special indorsement by the company in his favour as this might easily be forged (*ibid*, vol. liv, p. 3).

It is not certain, however, how far this still holds good. In *Lloyds Bank v. Chartered Bank of India, Australia and China*, 1928, the judge said: "If my butler for a year has been selling my vintage wines cheap to a small wine merchant, I do not understand how my negligence in not periodically checking my wine-book will be an answer to my action against the wine merchant for conversion."

### "Receives Payment for a Customer"

To obtain the protection of s. 82, the banker must act throughout simply and solely as an agent for his customer in collecting the cheque and receiving payment of the proceeds; but by virtue of the Bills of Exchange (Crossed Cheques) Act, 1906, the banker is not deprived of the protection of s. 82 merely because he credits the amount of a cheque to the customer's account before he receives the proceeds.

The protection will not apply, however, if there are circumstances indicating that the banker is not acting on behalf of a customer, as where he is collecting a cheque of which he is himself the holder for value by reason of having cashed it for a customer or a stranger, or of having accepted it in payment of a debt due to the bank, e.g., a sum due by a tenant of the bank for rent.

A banker collecting a cheque paid in by a customer does not lose the protection of s. 82 merely because he may also be a holder for value. The crucial test is whether the proceeds will ultimately rest in the customer's account.

For instance, a banker who collects crossed cheques for the credit of an overdrawn account, or who collects (for credit of a customer's account) crossed cheques on which he has a lien, has two possible defences if he is sued for conversion, so that if one fails the other may stand, viz. (1) that he is a holder in due course; and/or (2) that he is entitled to the protection of s. 82. If there is no question of forgery and the banker's defence under s. 82 fails because of negligence, he may succeed in his claim to be a holder in due course, because negligence does not prevent him from acquiring that status (*Lloyds Bank v. Hornby*, 1933). But if there is a forged indorsement and the banker cannot claim to be a holder in due course, he can still claim the protection of s. 82.

accounts at other not become a holder in due course merely because of collection to an account before he receives the proceeds, of agreement, such entries do not empower the bank, to act once, nor do they affect the banker's right to for, in the absence of, To acquire the rights of a holder in due return cheques drawn on a particular bank, a banker must have given value in *Barclays Bank*, 1924, sued the bank payable in words to himself, but in the absence of a particular receiving the credit them to a customer, he can If a banker

properly be regarded as receiving the proceeds on behalf of a customer within the meaning of the Act. (*Lloyds Bank, Ltd. v. Chartered Bank of India, Australia and China*, 1928.)

Unfortunately, there is no definition in the Act or elsewhere as to what constitutes "a customer" for the purposes of this section, so the matter must be decided by recognized practice and custom. Undoubtedly, a person is a customer who has some sort of an account with the banker, whether it is a current, deposit or bills discounted account, and a bank collects *for a customer* when it collects as clearing agent for another bank. (*Importers Co. v. Westminster Bank, Ltd.*, 1927.)

In *Ladbroke v. Todd*, 1914, it was decided that *one* transaction was sufficient to constitute a person a customer, so that a banker is acting *for a customer* when he collects cheques representing the first credit by which an account is opened. But a person does not become a customer merely by calling at a bank from time to time to cash cheques drawn in his favour. (*G. W. Rly. v. London and County Bank*, 1901.)

It would seem that a person who has an account at a branch is a customer, not only of the branch, but of the bank as a whole within the meaning of the section. If this view is accepted, a branch that collects crossed cheques on behalf of a customer of another branch or of its head office is protected by s. 82. But this protection does not extend to cheques included in credits for customers of *other banks*; in collecting such cheques the banker may incur liability to the true owner, although he would no doubt be indemnified against loss by the banker for whom the credit was accepted.

### **The Document must be a Crossed "Cheque"**

As s. 82 specifically mentions the word *cheque*, the banker is not protected by the section unless the instrument collected conforms in all respects with the essential requisites of a cheque.

Nevertheless, the banker is protected in respect of certain documents which are not cheques by s. 17 of the Revenue Act, 1883, and by the Bills of Exchange Act (1882) Amendment Act, 1932 (discussed in Chapter 22, wherein consideration is also given to the application of the crossed cheque sections of the Act to dividend and interest warrants).

### **The Cheque must be Crossed generally, or specially to the Collecting Banker**

The protection of s. 82 is not obtained unless the cheque collected is crossed generally or specially *when it comes into the hands of the collecting bank*; it is not sufficient that the collecting banker crosses the cheque himself.

To safeguard himself, the collecting banker should ensure (*e.g.*, by inserting a request on his paying-in slips and pass books) that all cheques for collection are crossed before they are paid in by his customers, who, it will be remembered, have authority as holders to cross cheques either generally or specially, or to add the words "not negotiable" to an existing crossing.

### **Collecting Cheques crossed "Not Negotiable"**

The words "Not negotiable" on the face of a cheque do not in themselves limit its transferability, so that a banker who collects a cheque crossed "Not negotiable" for someone other than the payee can scarcely be accused of neglecting his duty towards the true owner.

### **Not-transferable Cheques**

A collecting banker cannot claim the protection of s. 82 if he collects for anyone other than the payee a cheque that by its terms is made "not transferable" in accordance with s. 8 (1), *e.g.*, where it is drawn "Pay John Smith *only*". In collecting such a cheque, the banker should satisfy himself that his customer is the payee, and as evidence of this he will usually be required by the paying banker to confirm the payee's indorsement. The position is the same with regard to cheques bearing restrictive indorsements. (See Chapter 14.)

### **"Not Liable to the True Owner"**

The liability referred to in s. 82 covers any liability the collecting banker might incur in an action by the true owner for conversion, or for money had and received, or for any other reason. As the true owner of a cheque is the person entitled to the property in and possession of the cheque, freedom from liability to the true owner implies that the banker is secure from claims by any other persons.

### **Collection of Bills of Exchange**

As the crossed cheque sections of the Act apply only to cheques, a banker obtains no protection if he collects bills of exchange other than cheques either on behalf of his customer, or on his own behalf. He cannot escape liability to the true owner if there is any question of conversion, and his liability exists quite independently of any recourse he may have against his customer.

Apart from this risk, a banker who undertakes to collect bills for his customer incurs the usual responsibilities of an agent. As such, he must strictly carry out the rules laid down in the Act regarding the presentment of bills, and, in the event of his failure

to act with due diligence, he is liable to his customer for any loss that ensues.

The banker is liable for any delay in presenting bills for payment unless such delay is excused by the Act, or for omitting to present at the proper place, or for neglecting to have a bill noted or protested in the event of non-payment.

If presentment has to be made through another banker or other agent of the collecting banker, the bill must be sent off in time to give such banker or agent reasonable time in which to make the presentment, particularly if the place where the bill is payable or the place of residence of the drawee is distant or difficult of access. Furthermore, the collecting agent must, if necessary, be given time in which to determine whether any special expenses will be incurred by the presentment.

In the absence of instructions from the customer, payment should not be accepted unless it is made in legal tender, or by draft of a reputable banker or by a marked cheque. If an unmarked cheque is offered, the bill should not be surrendered to the acceptor, but should be attached to the cheque and a promise made to deliver the bill when the proceeds of the cheque are received from the drawee banker. Otherwise, the banker as agent of the holder of the bill will be deemed to have waived the rights on the bill in favour of the rights on the cheque; all parties prior to the holder will be discharged from further liability, and the holder will be left only with his right of recourse on the cheque.

If the banker is offered part payment of the bill, he should accept the amount tendered and indorse the bill with a receipt stating that the amount is received as part payment only, without prejudice to the rights of all parties liable on the instrument. The bill should not be surrendered. It should be noted for the unpaid balance, and notice of dishonour in respect of the amount unpaid given to all parties.

A foreign bill not paid by the acceptor on presentment should be noted, but noting is optional in the case of an *inland* bill. If a bill payable at the acceptor's place of business is not paid on presentment, a note should be left with the acceptor giving full particulars of the bill and informing him that it lies at the bank awaiting payment. Then, if payment is not received by the close of business on the same day, the bill (if foreign) should be noted for dishonour.

It is not usual to *protest* a bill until the customer gives instructions for this to be done. It is sufficient if the bill is noted at once. (See Chapter 18.)

When documents attached to a bill are to be given up on payment, the collecting banker should hand over the documents only, if he is paid in cash or by a banker's draft or marked cheque, unless, of course, he has any special instructions in this regard from the person on whose behalf the proceeds are being collected.

### Use of Bank Crossing Stamp

When a banker sends a cheque or bill for collection through an agent or through the clearing, he impresses the bank's name and address on the instrument with a rubber stamp.

Such stamping does not entitle the banker to the protection of s. 82 if a cheque so stamped was not already crossed when received by him. If, however, the cheque after being stamped is lost or stolen and is negotiated, the presence of the stamp would possibly be held to constitute notice to a transferee that the cheque was being wrongly dealt with.

### Treatment of Unpaid Cheques and Bills

When a cheque or bill is returned unpaid, the collecting banker should at once notify his customer, otherwise he is liable for negligence if such notice of dishonour is not given within the time required by the Act. As a rule, cheques and bills returned unpaid are forwarded to the customer with a covering letter giving the reason for the return.

The banker is entitled to debit his customer's account with the amount of a returned cheque, even though the cheque may not have been indorsed by the customer, or even though it may have been cashed for him, or have been expressly paid in to reduce a loan or overdraft granted by the banker.

When a cheque is returned with an answer such as "Refer to Drawer, please re-present", or "Effects not cleared", or when an unpaid cheque or bill is recalled by the drawee banker by letter, telegram or telephone for re-presentation, the collecting banker usually takes it upon himself to re-present the instrument without returning it to his customer. The same applies where the return is due to an obvious irregularity, *e.g.*, mutilation or error in indorsement, which may be put right by the confirmation of the collecting banker.

But in all cases where a cheque is thus re-presented, the customer should be duly advised, otherwise, if the cheque is again returned, he may refuse to be debited on the ground that he was entitled to assume that the cheque was paid as he had not been duly advised of its first dishonour, and the banker may have to stand any loss that is attributable to his omission to give his customer such notice of dishonour. Apart from the need for thus giving the customer notice of dishonour, it is to the customer's interests to be advised at once of the financial weakness of any persons with whom he is dealing.

Even if a cheque or bill is dishonoured because of some small irregularity, notice should be given by the collecting banker to his customer. The irregularity may be merely an excuse for returning the cheque because the drawer had no funds to meet it, in which



case the instrument may again be dishonoured when the irregularity is put right, and, if the banker has not given notice to his customer of the first dishonour, he may be held responsible for any loss sustained by the customer as a result of the delay.

When an unpaid cheque is one that has been cashed for a person who is not a customer, the collecting banker should not return the cheque itself to such person, but should send him notice of dishonour with a request for immediate payment of the amount. If the cheque itself is returned, the banker will be no longer a holder, and so unable to claim against the person for whom the cheque was cashed and prior parties.

## CHAPTER 17

### THE MACHINERY OF COLLECTION\*

THE great development of joint-stock banking and the wide use of cheques made essential some organization for the prompt settlement of the great number of claims and counter-claims arising between the banks. This organization took the form of a system of *clearings*, whereby the claims of each bank on the others are quickly and conveniently settled by a process of set-off. The claims arising between banks in the same town are adjusted through *local clearings*, but the cancellation of claims between widely separated banks is effected through the more elaborate organization of the London Clearing, having its headquarters at the London Clearing House.

#### English Local Clearings

Local clearings in England and Wales are conducted between the banks in all places where more than one bank is represented. Most of these clearings are conducted without any formality at one or two fixed times during the day, when clerks from the various banks meet at one of the bank offices to exchange their claims (called "Bundles of Charges"). The totals of the claims are agreed, and, at the end of the day, the net balance owing to or by each bank is settled, usually by a transfer between the respective head offices.

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\* The clearing system here discussed was that in force before the outbreak of war in 1939. As a result of the war, the arrangements were changed although the principles remain the same, and it is not possible to say what alterations, if any, will be made in the future. To meet war-time conditions, a central clearing was established at Stoke-on-Trent. To save paper and time, it was arranged for all cheques, etc., on the smaller clearing banks (Coutts, District, Glyn, National and Williams Deacons) to be listed together in most branches, and for all Town, Metro and Country cheques to be lumped together for remittance for settlement to the central clearing (except that Town cheques collected by Town Clearing Branches were dealt with in London). Also, the times allowed for collection (see p. 193) were increased by one or more days.

In certain large provincial centres—Birmingham, Bradford, Bristol, Hull, Leeds, Leicester, Liverpool, Manchester, Newcastle-on-Tyne, Nottingham and Sheffield—there are specially organized local *clearing houses*. In these towns the principal local branch of each bank acts as a local clearing agent for all branches of that bank in the clearing area, receiving from those branches cheques drawn on all other banks for clearance, and distributing among the branches cheques drawn thereon and received from the other banks. Each branch is debited or credited through the head office with the amount due to or payable by it, and the net balance owing to or by each bank in respect of the local clearing is usually settled by transfer through the Clearing House Account at the local branch of the Bank of England.

### The London Clearing House

Most cheques drawn on English banks are presented and collected through the London Clearing House. This clearing was established in 1775 between the London private bankers, the joint-stock banks\* being admitted in 1854.

The general principle of the clearing is that cheques and certain other items payable at the various offices and branches of the English clearing banks are brought into one central depot where they can be conveniently exchanged and set-off. Settlement of the "difference" or balance owing to or by each bank is effected by a transfer between that bank's account and the Clearing House Account, both at the Bank of England.

Despite the vast number of instruments handled and the vast totals of the transactions, the clearing works with precision, and not only effects great economy in the work of the banks, but also permits commercial transactions to be settled with a minimum of expense and delay.

The London Clearing House originally dealt only with cheques payable in the City area, but it is now divided geographically into three sections: (a) *The Town Clearing*, which deals with cheques drawn on all banks in the central London or City area around the Bank of England, including the head offices of most of the banks; (b) *The Metropolitan Clearing*, which deals with cheques drawn on all banks and branches outside the Town Clearing, but within a radius of about four miles; and (c) *The Country Clearing*, established in 1858 to deal with cheques drawn on bank branches that are outside the range of the other two clearings.

The Country clearing deals only with *cheques*, but the Town and

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\* The members are now Bank of England; Barclays Bank, Ltd.; Coutts & Co.; District Bank, Ltd.; Glyn, Mills & Co.; Lloyds Bank, Ltd.; Martins Bank, Ltd.; Midland Bank, Ltd.; National Bank, Ltd.; National Provincial Bank, Ltd.; Westminster Bank, Ltd., and Williams Deacons Bank, Ltd.

Metropolitan clearings deal with cheques, bills and other claims. For convenience in sorting, and in order to avoid confusion, cheques belonging to the three groups are distinguished by the letters "T", "M", or "C" printed in the left-hand bottom corner.

### **The Town Clearing**

Two Town clearings are held twice daily. The morning clearing deals primarily with cheques and bills drawn upon the town offices of the respective clearing banks, which have been received by the morning post from home and foreign branches and correspondents, or which were received at the City offices on the previous day too late for presentation through that day's Town clearing. The larger afternoon clearing covers cheques and bills received at the various City offices of the clearing banks during the day, and also items received from Metropolitan and suburban branches for special presentment.

The cheques and bills on other London banks which each head office receives from its branches are listed by the latter on separate sheets for each clearing bank. These lists are agreed by the head office Clearing Departments on receipt, and their totals are machined or entered in a special "Out-Clearing Book" under the names of the respective banks, a grand total of the charges to be presented to each of the other clearing banks being thus obtained.

These bundles of cheques and bills—referred to as the presenting bank's "Out-clearing"—are taken to the Clearing House by the "Out-clearing" clerks, by whom the items are handed to the "In-clearing" clerks of the drawee banks. The items each bank thus receives from all the other banks are collectively described as that bank's "In-clearing", and, on receipt, the amounts are machined and the totals relating to each bank verified with the total supplied by that bank's "Out-clearer". These totals are then carried to the settlement sheet in the manner described below.

The cheques received by each "In-clearer" are taken to his head office for sorting and despatch to the various City offices on which they are drawn. Any returns must reach the Clearing House before 5 p.m. on ordinary days or 1.30 p.m. on Saturdays, and must be received by the clearers and their amount credited to the returning bank on the same day by an adjustment on the Town clearing sheet. If returns are received by the head office too late for inclusion in the clearing, they must be despatched at once to the banks named in the crossings.

### **The Metropolitan Clearing**

This deals with cheques, bills, etc., drawn on the Metropolitan branches of the clearing banks, and takes place once a day.

The cheques exchanged between the representatives of the

various banks are despatched for payment to the branches on which they are drawn. Metropolitan cheques for any reason returned unpaid must be returned by post on the day of presentation *direct* to the bank or branch whose name appears in the crossing.

The totals owing to or by each bank in respect of the Metropolitan clearing are included in the Town clearing totals of the following business day.

### The Country Clearing

The Country clearing deals with cheques drawn on the country branches of the clearing banks. The branches list on separate sheets all country cheques drawn on each of the other clearing banks, and forward them to their head offices, where the totals are machined on special lists to arrive at a grand total of the "Out" charge to be presented to each of the other clearing banks. The "In" country clearing received by each bank from all the other banks is sorted and machined at its head office, and the cheques on each branch are thereafter forwarded by post for payment. The totals of the country clearing are agreed between the "In" and "Out" clearers of each bank, and the grand balance struck between each bank and all the other banks is included in the Town clearing settlement of the next business day but one.

Country clearing cheques returned unpaid must be sent *direct* by the drawee branch to the branch of the presenting bank indicated in the crossing on the face of the cheque, a voucher giving the necessary particulars being forwarded on the same day to the head office of the drawee banker so that the amount may be allowed for in the settlement. The branch to which the unpaid cheque is returned credits the amount to its head office or its clearing agent on the day of receipt, so that the head office or clearing agent may in due course credit the drawee banker in respect of the return.

Since bills of exchange on country branches cannot be included in the Country clearing, they must be presented direct, if possible, through a branch or agent in the town where they are payable.

### The Clearing Settlement

The grand totals of the morning Town clearing are agreed between each bank before the clearing clerks leave the Clearing House. The afternoon clearing proceeds until the door of the Clearing House is closed at the appointed time as an indication that no further cheques can be presented. The total of the cheques presented in the second clearing is then ascertained and verified, and the balances which are owing to or by each bank are carried to a "Clearing Summary Sheet".

On this sheet is entered also the balance of the Country clearing for the previous day but one, together with the balance of the

Metropolitan clearing for the previous day, allowance for returns having been made in both cases. When the two columns of this sheet are totalled, the difference between the two totals gives the amount owing to or by each bank from or to the Clearing House as a whole, and this difference is settled by a transfer at the Bank of England between the account of that bank and the Clearing House Account. For purposes of this transfer a green or white ticket is used, a *green* ticket when a bank on balance has to *receive* from the Clearing House Account, and a *white* ticket when the bank has on balance to *pay* the Clearing House.

### Cheques, etc., on Banks outside the Clearings

Cheques and bills on the many banks, discount houses, etc., which have offices in the City, but which are not members of the Clearing House, are described in practice as "*Walks*", by reason of the fact that they are collected individually by walks-clerks whose business it is to make a round of the City from the respective head offices. The items to be collected in this way are listed by the various branches and correspondents of the banks on special "*Walks*" Clearing forms before despatch to the head office or clearing agent, and settlement of the totals involved is made between the banks either by transfers in their accounts or by bankers' payments which are passed through the Town clearing for payment.

Cheques, dividend warrants, interest warrants and bank post bills on the Bank of England are dealt with by other banks in much the same way as "*Walks*". The totals of such items received by the clearing banks from their branches and correspondents are recorded by the respective head offices in the *Bank of England Book* or *Goldsmiths' Book*, together with any other articles which it is proposed to pay in to the Bank, as, for example, surplus or defaced Bank notes, gold and silver coin, etc. The articles are thereafter presented direct to the Bank, and their total, after verification, is credited to the account of the presenting bank. The Bank of England itself presents cheques on other banks through the Clearing House in the ordinary way: in other words, the Bank clears "*outwards*" but not "*inwards*".

### Items Drawn on Scotch and Irish Banks

Cheques and bills drawn upon the London offices of Scotch and Irish banks are normally collected by individual presentation at the offices of the drawee banks much in the same way as other "*Walks*" cheques, and settlement is effected either by banker's payment or by current account transfers.

Cheques and bills drawn upon the offices of Scotch and Irish banks in Scotland and Ireland are listed by the collecting branches

of the English banks on special forms, and forwarded to the respective head offices as part of the day's clearing. The articles are listed by the head office of each English bank and are sent for collection to the London office of the Scotch or Irish bank which acts as a clearing agent in its own country on behalf of the English bank.

### Time Allowed for Collecting Cheques\*

A banker collecting cheques for his customer must do so with due diligence. Cheques collected through one of the clearings must be presented in accordance with the rules of the particular clearing concerned, and failure by a banker to observe those rules in collecting crossed cheques will amount to negligence sufficient to render him liable to his customer for any loss that may ensue.

In practice, City banks endeavour to present all Town clearing cheques on the day of receipt, for it is the custom to assume that all cheques paid in by customers at the City offices of the clearing banks are paid unless they are returned unpaid on the same day. Accordingly, if one of the Town clearing banks receives a cheque too late for presentment through the clearing, it is usual to present the cheque for marking at the bank upon which it is drawn. Cheques so marked are invariably paid on subsequent presentation. (See p. 177.)

Cheques received by Country banks are forwarded for collection on the day of receipt, and in normal times are assumed paid if they are not returned after the lapse of *three* clear days in the case of Country cheques, and after *two* days in the case of Town and Metropolitan cheques. Scotch and Irish cheques normally take four or five days for presentment and payment, and it is therefore not safe to assume that they are paid until the lapse of at least a week.

A collecting banker must present *local* cheques for payment not later than the business day following that upon which the cheques are received. As a general rule, such cheques are presented wherever it is possible on the day of receipt, but cheques which are received too late for presentation on that day must not be held over longer than the following day.

When cheques are presented *direct* by a banker in one place to a banker in another (*i.e.*, other than through the clearing), the cheques must be forwarded for collection not later than by the last post on the day following that on which the cheque is received, or by the first post thereafter if there is no post on that day.

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\* See footnote, page 193.

## THE DUTIES OF THE HOLDER

THE Bills of Exchange Act imposes upon the holder of a bill certain important *duties*, the neglect of which may have serious consequences for both himself and other parties to the bill. The main duties are : (a) to present the bill for acceptance and payment in accordance with the rules laid down in the Act ; (b) to note or protest the bill on dishonour, where necessary ; and (c) to give due notice of dishonour to all prior parties.

If, through negligence, the holder omits or unduly delays to fulfil a statutory duty, the effect may be to discharge certain parties, not only in respect of their liability on the bill, but also in respect of the debt or other consideration for which the bill was given. Suppose that a bill at three months, drawn by Jones on Robinson, is given by Jones to Brown in payment for goods. Brown indorses the bill to a holder who omits to present it for acceptance or for payment on the due date. If thereafter the holder cannot obtain payment from Robinson, both Brown and Jones are discharged from liability on the bill, while Brown is also freed as regards the consideration between himself and the negligent holder. And this is so even if Brown is not actually prejudiced by the holder's omission to present the bill to the drawee ; e.g., where the drawee Robinson is insolvent.

Where a bill is in the hands of an *agent* of the holder, that agent must exercise as much care in discharging the duties of the holder as is required in the case of the holder himself, and if by reason of the agent's negligence the principal suffers loss, the agent will be liable to make good the loss to his principal. This point specially concerns bankers, who frequently undertake to present bills for acceptance and payment on behalf of customers.

## PRESENTMENT FOR ACCEPTANCE

While a bill may be presented for acceptance by the drawer before issue, the duty usually falls upon the payee or a subsequent holder. But, subject to certain statutory exceptions shortly to be mentioned, it is not *compulsory* to present a bill for acceptance. The holder may await maturity and then present the bill for payment. As a rule, however, the holder presents a bill for acceptance as soon as possible (a) in order to secure the liability of the drawee by his signature on the instrument, for until the drawee signs he is not liable for due payment of the bill ; (b) because the signature of the acceptor on a bill increases the security for its due payment and makes the bill more readily negotiable ; (c) because, if the bill is not accepted by the drawee on presentment,

the holder obtains an immediate right of recourse against the drawer and any other parties.

### Requisites of a Valid Acceptance

17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions, namely :

- (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.
- (b) It must not express that the drawee will perform his promise by any other means than the payment of money.

No one but the drawee can accept a bill, though his signature may be written by himself or by his duly authorized agent. Acceptance by anyone other than the drawee or his agent in the drawee's name is either an unauthorized act or a forgery, while acceptance in his own name by anyone other than the drawee is of no effect as an acceptance (unless it is an acceptance for honour—see Chapter 19) although the signer may render himself liable as an indorser to a holder in due course. (See s. 56.)

The signature to an acceptance need not, however, strictly conform to the name of the drawee. The two must be considered together, and the acceptance is valid if it is, in fact, that of the drawee by himself or his authorized agent. Thus, if a bill is drawn on "B. and Co." whose proper style is "A.B. & Co.", an acceptance in the latter name is valid.

If a bill is accepted by only one or some of two or more drawees, those who sign the acceptance are bound although the others are not. Similarly, acceptance by a partner in his own name of a bill addressed to a firm binds him but not the firm. But if a bill is addressed to Robinson, a partner in a firm, and Robinson accepts in the firm's name, "Brown & Robinson", he is personally liable as acceptor and the firm is not bound, because "Brown & Robinson" is not the signature of the drawee.

By s. 17 (2b), an acceptance is invalid if the acceptor undertakes to pay in any form other than in money, *e.g.*, in Exchequer Bills, or in goods, or in silver bullion.

### Time when a Bill may be Accepted

18. A bill may be accepted—

(1) Before it has been signed by the drawer, or while otherwise incomplete.

(2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment :

(3) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.



Although s. 18 (1) allows an incomplete or inchoate bill to be accepted, an instrument that is lacking in a legal essential (*e.g.*, the drawer's signature) will not be valid as a bill until the omission is rectified. The effect of the acceptance of a bill that is overdue is as if the acceptor had accepted a bill payable on demand: he is immediately liable to pay the instrument.

There is no presumption as to the *exact* date on which an undated acceptance was given; but, in the absence of evidence to the contrary on the face of a bill, an acceptance is deemed to have been made before maturity and within a reasonable time after issue of the bill.

S. 18 (3) is intended to secure that the holder of a bill that is dishonoured but subsequently accepted shall, as far as is possible, be placed in the same position as if there had been no dishonour. Hence, if a bill payable three months after sight is dishonoured by non-acceptance on the 1st June, but is subsequently accepted by the drawee on the 4th July, the holder may calculate the due date of the bill as from the 1st June, and so present it for payment on the 4th September. In the absence of this provision, the bill could not be presented for payment until the 7th October, in which case the holder would be prejudiced by being out of his money for an additional thirty-three days, while the acceptor would have the use of the funds for the same period.

### “General” and “Qualified” Acceptances

Whereas the order from the drawer to the drawee must be unconditional and unqualified, s. 19 permits the drawee to qualify his acceptance:—

19.—(1) An acceptance is either (a) general or (b) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

- (a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:
- (b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:
- (c) Local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere:

(d) Qualified as to time:

(e) The acceptance of some one or more of the drawees, but not of all.

Although the drawer in making out his order must conform to a very rigid standard, the acceptor, without affecting the validity

of the instrument, can indicate how, where, and when he will pay the instrument, and, by the terms of his acceptance, can vary *the effect of the bill as drawn*, even to the extent of making the payment conditional.

Wherever possible, however, an acceptance is to be construed as general and not qualified, and the insertion by the acceptor of a mere memorandum, *e.g.*, a wrong due date, does not make an acceptance qualified. To constitute a qualification, words added to an acceptance must clearly vary the tenor of the bill and be capable of being clearly understood by the holder.

The following are examples of the five classes of qualified acceptance:—

- (a) *Conditional*: "Accepted payable on surrender of bills of lading", or "Accepted provided 20 Crown Mines Shares are sold".
- (b) *Partial*, *e.g.*, on a bill drawn for £100: "Accepted payable for £50 only, James Brown"; "Accepted payable £50 in cash and £50 in goods". The latter is valid as an acceptance for £50 only.
- (c) *Local*: An acceptance in the form "Accepted payable at the Northern Bank, Northtown", is general, whereas any of the following are qualified as to place, *i.e.*, local: "Accepted payable at the Northern Bank, Northtown, and not elsewhere", or "Accepted payable only at the Northern Bank, Northtown", or "Accepted payable at the Northern Bank, Northtown, and there only".
- (d) *Qualified as to Time*, *e.g.*, on a bill drawn payable three months after date: "Accepted payable six months after date, James Brown".
- (e) *Acceptance by some of several Drawees*, *e.g.*, when a bill drawn on A, B, and C is accepted by A only. But if A has authority to accept for all the drawees and does so accept, then the acceptance is not qualified.

A holder is not bound to take a qualified acceptance but may regard it as a dishonour of the bill.

### When a Bill must be Presented for Acceptance

39.—(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has no time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

S. 39 (4) protects the holder of a domiciled bill that reaches him too late to give him time to present it for acceptance before maturity. Suppose a bill payable one month after date, drawn in New York on a Bristol firm, but made payable in London, reaches London on the date of maturity. As the holder must present the bill for acceptance at Bristol before presenting it for payment in London, the subsection excuses the delay that arises and ensures that the delay occasioned by the presentment for acceptance will not prejudice the holder's rights against prior parties.

### Time for Presenting Bills after Sight

As the maturity date of a bill payable after sight cannot be fixed until it is presented for acceptance, unreasonable delay in making presentment might prejudice the position of the drawer or of an indorser, *e.g.*, where the holder delays for so long that, when the bill is presented, the drawee has become financially unable to pay it. Hence, s. 40 enacts that :—

40.—(1) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

[See Section 41 (2) for the provisions.]

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

What is a reasonable time for the purposes of this section is a question of fact. If a person in London draws a bill at one month's sight on another person, say, in Birmingham, the holder may not be guilty of unreasonable delay if he holds the bill for four days before presenting it for acceptance, whereas a delay of six months before negotiation or presentment for acceptance would probably be regarded as sufficiently unreasonable to discharge the drawer and indorsers.

### Rules Governing Presentment for Acceptance

41.—(1) A bill is duly presented for acceptance which is presented in accordance with the following rules :

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue :

- (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only :
- (c) Where the drawee is dead, presentment *may* be made to his personal representative :
- (d) Where the drawee is bankrupt, presentment *may* be made to him or to his trustee :
- (e) Where authorized by agreement or usage, a presentment through the post office is sufficient.

There is no provision in this section (as there is in the case of presentment *for payment*) as to *the place where* a bill is to be presented for acceptance. Usually, the place of presentment will be the address of the drawee as given on the bill, but, if the address is not so given, presentment will be excused if the holder after exercising reasonable diligence cannot find the drawee.

Where the drawee is a trader, it is usual to present bills at his place of business, in which case placing them in a bill box or giving them to a clerk in the office constitutes a sufficient presentation to the drawee. But any such agent to whom a bill is presented must be some person who may reasonably be assumed to have authority to take and deal with a bill. It is not sufficient to hand in a bill to a maid or child at a private house.

Presentment for acceptance must be made on a business day at a reasonable hour, *i.e.*, during advertised banking hours in the case of a bank, or during usual and recognized business hours in the case of a trader. The term "business day" is defined by s. 92 :—

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean—

- (a) Sunday, Good Friday, Christmas Day:
- (b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it:
- (c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

In connection with s. 41 (1b), reference should be made to s. 19 (2e), from which it will be seen that, if one of two or more drawees, refuses to accept, the acceptance will be qualified and must be treated as such.

By ss. 41 (1c) and 41 (1d), presentment for acceptance to the legal representatives of a deceased drawee, or to the trustee of a bankrupt drawer, is *optional*. It is, in fact, excused by s. 41 (2a), reproduced below, and the holder may treat the bill as dishonoured by non-acceptance.

S. 41 (1e) recognizes a common practice amongst merchants and banks of presenting bills by post for acceptance.

## When Presentment for Acceptance is Excused

41.—(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

- (a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill :
- (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected :
- (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground :

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Where presentment is not excused, there is an *absolute* duty on the holder to present ; presentment is not excused merely because the holder has good reason to believe that presentment may be useless or futile.

## Manner of Presenting for Acceptance

By custom (*not* by any provision in the Act), the drawee is allowed a period of twenty-four hours (exclusive of " non-business " days) in which to accept or dishonour a bill left with him for acceptance. After this period, the drawee must hand the bill back to the presenter, or he may render himself liable for conversion, *i.e.*, wrongful retention of the property of another.

This does not mean that the drawee must *send* the bill to the presenter, for, in the absence of express arrangement between the parties or of an agreement to the contrary implied from the course of dealings between them, it is the duty of the holder to call for the bill after the expiration of the prescribed period.

## Holder's Rights in regard to Qualified Acceptances

44.—(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

Should the holder decide to take a qualified acceptance, he should give the other parties notice of the qualification and any such party who does not object to the qualification within a reasonable time will be deemed to have assented thereto [s. 44 (3)]. In

the case of a *partial* acceptance, however, the drawer and indorsers will not be discharged even if they object to the qualification, provided the holder gives them proper notice thereof

## PRESENTMENT FOR PAYMENT

The rules regarding presentment for payment are of particular importance to bankers, as they have frequently to present bills for payment on behalf of their customers. As a collecting agent, a banker is liable for negligence or default on his own part, and (unless it is expressly agreed by the customer to the contrary) on the part of any agent or correspondent whom he employs to make the presentment.

Presentment for payment is governed by different considerations from those affecting presentment for acceptance and these are material as bearing on the question whether the holder has or has not used reasonable diligence to effect presentment. Presentment for acceptance is personal, while presentment for payment is local. A bill must be presented for payment at the proper place (see p. 208) and anyone authorized to do so can hand over the money. Presentment for acceptance must be to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take and sign the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but there is no such fixity as to the day when it may suit the holder to present a bill for acceptance.

### Usually, a Bill must be Presented for Payment

45. Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

The provisions referred to are those contained in s. 46 (see below) which dispense with, or excuse delay in, presentment for payment.

When a bill is given to the holder in payment of a debt, the discharge of the drawer or of an indorser by failure to present for payment will also free him from the debt in respect of which he gave the bill.

But failure to present a bill for payment does not usually discharge the acceptor, for, by s. 52 :—

52.—(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

S. 52 (1) is based on the principle that a debtor (*i.e.*, the acceptor) must seek out his creditor to pay a debt, and its effect is to prevent the acceptor from taking advantage of any irregularity in the presentment. But if a holder commenced action on a bill without having first presented it for payment, he would presumably have to bear the costs of the action.

S. 52 (2) indicates the sole case where the acceptor is discharged if a bill is not presented for payment, *i.e.*, if, in accordance with the terms of a qualified acceptance requiring it to be presented on its due date, it is not so presented.

45. A bill is duly presented for payment which is presented in accordance with the following rules:—

- (1) Where the bill is not payable on demand, presentment must be made on the day it falls due.
- (2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

The due date of a bill not payable on demand is calculated in accordance with the provisions of s. 14. (See Chapter 10.) S. 45 (2) is modified as regards the drawer of a *cheque* by s. 74. (See p. 126.)

### Who may Present for Payment

45.—(3) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place, as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

Presentment for payment is invalid unless it is made by the *holder* or by some person authorized to receive payment on his behalf, and, as the acceptor's obligation is to pay the person who can give a *valid* discharge for the payment, he may be called upon to pay again to the true owner if he pays a person who holds through a forgery. But the drawee of a *cheque*, *i.e.*, the paying banker, is protected by s. 60 even in the case of a forgery, provided that he pays in good faith and in the ordinary course of his business. (See p. 171.)

A holder whose title is *defective*, such as a finder or a thief who does *not* claim through a forgery, can give a valid discharge to a drawee who pays in good faith.

## Manner of Presenting for Payment

52.—(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

The bill need not be delivered to the acceptor until payment has been made. In this respect, the provisions governing presentment for payment differ from those governing presentment for acceptance, for, as already stated, presentment for acceptance involves handing the bill to the drawee, who is allowed a reasonable time (by custom, twenty-four hours) in which to accept or refuse.

The rule that the drawee is entitled to possession of a bill on payment operates also in the case of a cheque drawn on a bank. The paid instrument serves as a voucher and discharge between the person paying and the drawer.

Although the rule is that presentment of a bill for payment must be made *personally* by the holder or by some person authorized to receive payment on his behalf, s. 45 (8) provides :—

45.—(8) Where authorized by agreement or usage, a presentment through the post office is sufficient.

Presentment of a bill by post would not be made unless the standing of the acceptor was beyond question, otherwise some difficulty might arise in obtaining its return in the event of dishonour. Hence, the usual practice is to send the bill to an agent or correspondent of the holder (or of his bank) in the town of payment so that the agent can present it to the acceptor.

The holder of a bill who presents it by post is not liable for any delay not imputable to his fault, misconduct or negligence. [See below, s. 46 (1).]

## The Proper Place of Presentment.

45.—(4) A bill is presented at the proper place :—

- (a) Where a place of payment is specified in the bill and the bill is there presented.
- (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.
- (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.
- (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.
- (5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.



The place of payment may be specified either by the drawer or by the acceptor, but, if neither indicates the place of payment, ss. 45 (4) (b), (c) and (d) must be strictly applied, and s. 45 (4d) applies only when all other places as specified in the previous subsections are exhausted. Suppose, for example, that the bill does not specify a place of payment or the address of the drawee, then s. 45 (4d) will apply only if the holder does not know the residence or place of business of the acceptor. If he does know either of these, presentment at any other place, *e.g.*, during a chance meeting in the street, will not constitute a valid presentment.

If a bill is accepted payable at the acceptor's bank, presentment is valid only at the bank named, and presentment to the acceptor personally is invalid and insufficient.

A bill accepted payable at a bank is duly presented for payment if presented to a clerk or official of the bank at or through the clearing house in the usual way.

If alternative places of payment are specified, *e.g.*, the residence of the drawee and the address of his bank, presentment for payment at either place is sufficient and valid. Again, suppose a bill addressed to "Mr. Brown, 4, Marlborough Road, Bristol," is accepted generally by the drawee Brown, and that the holder presents the bill at the address given but finds either (a) that the house is unoccupied, or (b) that Brown is not now living there. In both cases the presentment for payment at the specified address is sufficient; no further presentment need be made before the holder applies to the other parties for payment.

### To Whom Presentment must be Made

By s. 45 (3), presentment for payment must be made to the person designated as the payer or to some person authorized to pay or refuse payment on his behalf. In this connection, s. 45 (6) and (7) further provide that:—

45.—(6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be and with the exercise of reasonable diligence he can be found.

In regard to s. 45 (6), if two or more persons who have accepted a bill are known to be partners in a *trading* firm, or sign as such, presentment may be made to one of them, for one such partner has implied authority to pay or refuse payment of a bill on behalf of himself and his co-partners. Otherwise, presentment must be made individually to each acceptor.

S. 45 (7) requires presentment to be made to the personal representatives *only if no place of payment is specified in the bill*; if such a place of payment is given, then presentment for payment must be made at that place, as provided by s. 45 (4a).

The bankruptcy of the drawee or acceptor excuses presentment for acceptance [s. 41 (2)] but does not excuse presentment for payment.

### When Delay in Presentment for Payment is Excused

It may happen that the holder of a bill, without any fault or negligence on his part, is unable to present the instrument for payment on the prescribed day. Then, by s. 46 (1) :—

46.—(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

This sub-section does not *entirely* excuse presentment for payment, and presentment must be made with due diligence as soon as the disability is removed. If the town of payment is being besieged, or is surrounded by floods, presentment is temporarily excused, but would have to be made as soon as the siege was raised or the floods abated.

Delay in making presentment is excused where it is caused by fault or mistake on the part of the post office, provided the bill is dispatched by the holder in time to be presented to the drawee in the ordinary circumstances on the date of maturity. (See above, "Manner of Presenting for Payment".)

### When Presentment for Payment is Dispensed with

46.—(2) Presentment for payment is dispensed with,—

- (a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

- (b) Where the drawee is a fictitious person.

- (c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

- (d) As regards an indorser, where the bill was accepted or made for the account of that indorser, and he has no reason to expect that the bill would be paid if presented.

- (e) By waiver of presentment, express or implied.

Different rules are laid down in respect of different parties. The general rule is that failure on the part of the holder to present a

bill for payment frees the drawer and indorsers from liability. But clause (c) states the circumstances in which the *drawer* is not released from liability by failure on the part of the holder to present the bill; clause (d) states the circumstances in which an *indorser* is not released, whilst clauses (a), (b) and (e) state the circumstances in which *all parties* remain liable despite non-presentation for payment.

In *Hardy v. Woodroffe*, 1818, a note was made "payable at Guildford" where the drawee did not reside. After being presented without avail at two banks in the town, it was treated as dishonoured. It was held that the presentment was excused because it could not be made after the exercise of reasonable diligence.

Circumstances in which the holder has reason to believe that a bill will be dishonoured on presentment but which do not excuse such presentment arise, for example, where the acceptor has become bankrupt, or has informed the holder that he will not or cannot pay the instrument when it falls due.

Presentment for payment is excused on the grounds that the drawee is a fictitious person if the bill is drawn on some person whose name has been inserted by the drawer by way of pretence only. In such a case, the bill may be treated as a bill or promissory note at the option of the holder, and there is no need to prove presentment for payment or dishonour before application for payment is made to the drawer or a prior indorser.

S. 46 (2c) applies to cases in which the *drawer*, and not the holder, has reason to believe that the bill will not be paid if presented. Hence, if a bill accepted for the accommodation of the drawer is indorsed by him to a holder, then, unless the drawer has supplied the acceptor with funds to meet the bill, he cannot escape liability on the ground that the bill has not been duly presented. But presentment of such a bill *must* be made by the holder if he wishes to retain his rights against prior indorsers.

It follows from s. 46 (2c), that failure to present a cheque for payment does not release the drawer, if he has no funds at the bank to meet it.

In like manner, clause (d) provides for the case where an indorser has no reason to expect that a bill accepted for his accommodation will be paid if presented. In such circumstances, the holder need not prove presentment for payment before proceeding to claim payment from the indorser.

Nevertheless, the holder would be well advised to present the bill, even if he knows that it was made to accommodate an indorser, since the latter may have provided the acceptor with funds, while the bill must be presented if the holder wishes to preserve his rights against other indorsers and the drawer.

In regard to clause (e), *implied* waiver will arise if the acceptor

or an indorser, knowing that the holder has omitted to present the bill for payment on the due date, nevertheless promises to pay the instrument; or if the acceptor, knowing the bill had not been presented, hands the holder a sum of money in part payment of the bill.

*Express* waiver will arise, for instance, where an indorser, in accordance with s. 16 (2), adds after his signature "Presentment for payment waived". This is effective only against the indorser so signing and subsequent parties.

### Loss of Bill does not Excuse Presentment for Payment

The fact that a bill has been lost does not excuse presentment for payment. The holder should present a copy of the bill and tender the acceptor an indemnity against the claims of any persons who may come into possession of the original instrument in circumstances which give them a right to sue on it, *e.g.*, where they have given value in good faith for the bill.

## CHAPTER 19

### DISHONOUR OF A BILL AND ITS CONSEQUENCES

If the holder of a bill has properly presented the bill for acceptance or payment, and acceptance or payment is refused, the bill is said to be *dishonoured* by non-acceptance or by non-payment, as the case may be.

#### Dishonour by Non-Acceptance

It is usual, for reasons already given, for the holder to present a bill for acceptance as soon as possible. If the bill is not accepted, he must treat it as dishonoured, in accordance with s. 42:—

42.—(1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

By "customary time" is meant from any business hour on the day of presentment to the close of business on the following business day. In other words, the drawee is given about twenty-four hours during which to make up his mind whether or not to accept a bill.

left with him for acceptance. In reckoning the twenty-four hours, "non-business" days are excluded.

43.—(1) A bill is dishonoured by non-acceptance—

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained: or
- (b) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

It is not the duty of the acceptor to return the bill to the holder after acceptance or refusal to accept; the holder must call for it.

Although "such an acceptance as is prescribed by the Act" [s. 43 (1a)] may be either general or qualified (s. 19), it is provided by s. 44 (1) that:—

44.—(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

Dishonour by non-acceptance may, therefore, arise in *four* cases: (a) when acceptance is refused or cannot be obtained [s. 43 (1)]; (b) when the drawee does not accept within the customary time [s. 42 (1)]; (c) when the acceptance given is not in accordance with the Act [s. 43 (1)]; and (d) when presentment for acceptance is excused [s. 41 (2) and s. 43 (1b)]. When presentment is excused, the holder's immediate right of recourse against prior parties [s. 43 (2)] arises although the bill has not been dishonoured.

The holder's right of recourse is not the same as an immediate *right of action*. His right of recourse becomes a right of action only when he has complied with any conditions precedent laid down in the Act, *e.g.*, by giving notice of dishonour, or protesting when necessary (see below, pages 221–5). When he has complied with these conditions, he has an immediate right of action against the drawer and indorsers, and he need not present the bill for payment at the due date before commencing such an action.

By s. 18 (2) and (3), a bill may be accepted after it has been previously dishonoured, but it is within the holder's option to permit the drawee to accept or not in such circumstances.

### Dishonour by Non-Payment

47.—(1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

The "provisions of this Act" here referred to are those relative to payment for honour contained in s. 68 (see p. 229).

S. 47 (2) makes the consequences of dishonour by non-payment almost the same as in the case of dishonour by non-acceptance. The holder has an immediate right of action against the drawer and indorsers, subject to his complying with any conditions precedent, such as giving notice of dishonour and protesting where necessary.

There is, however, one important difference. On dishonour by non-acceptance, there is no right of *recourse* against the *drawee*, because he is not a party on the bill, whereas, on dishonour by non-payment, there is an immediate right of *action* against the drawee in his capacity of *acceptor*. And this right is not subject to any conditions precedent, as in the case of a right of action against the drawer or indorsers, for by s. 52 (3) :—

52.—(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

When a bill is dishonoured by non-payment, action thereon cannot be taken until after the expiration of the last day of grace, and the right of action is limited, as in the case of any other simple contract, to six years from the time when the right of action first arises, *i.e.*, from the date of dishonour. Right of action against the drawer or indorsers does not arise until notice of dishonour has been or ought to have been *received by them*.

### Notice of Dishonour

One of the conditions precedent to the conversion of the holder's right of recourse against prior parties to a bill into a right of action against them is the giving of due notice of dishonour to such parties. In this connection, s. 48 provides :—

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged ; Provided that—

- (1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

Ss. 39 and 46 (2) provide that in certain circumstances presentment for acceptance or payment may be unnecessary in order to charge the drawer and indorsers ; but if in such cases the holder chooses to present and the bill is dishonoured, he must give notice of dishonour, unless this is dispensed with by virtue of s. 48 (2), below.

Where a bill has been dishonoured by non-acceptance and is subsequently negotiated, the transferee may or may not be aware of the dishonour. But unless such a transferee is a holder in due

course and, therefore, protected by s. 48 (1) above, he will be prejudiced by the omission to give due notice of dishonour and unable to sue any parties who have been discharged by the omission to give such notice.

48.—(2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

The effect of this sub-section is illustrated in the case where a three-months' bill in the hands of a holder X is dishonoured by non-acceptance, and X, instead of immediately exercising his rights of recourse against the drawer and prior indorsers, gives them notice of dishonour and retains the bill until maturity, when he presents it to the drawee for payment. If the bill is again dishonoured, X need not give the drawer and indorsers notice of the dishonour by non-payment, unless the bill has in the meantime been accepted by the drawee.

The provisions concerning a valid and effectual notice of dishonour are contained in s. 49, and may be considered under five headings: (a) Who may give notice of dishonour; (b) Who benefits by the notice; (c) The form of notice; (d) To whom notice must be given; (e) When notice must be given.

### Who May Give Notice of Dishonour

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

- (1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.
- (2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

Since notice must be given by or on behalf of the holder or an indorser, notice by a stranger to the bill does not constitute effective notice to the person sought to be charged. But if notice is given by a person who *purports to act* as agent, the giving of notice may be ratified by the principal and so made effective. Even when notice is given by or on behalf of an indorser, the indorser must be one who is liable on the bill at the time the notice is given. Hence, effectual notice cannot be given by an indorser who has recourse, or an indorser who has himself been freed from liability by the holder's delay in giving him notice. Suppose A, B and C are successive indorsers of a dishonoured bill, and C gives notice too late to B only. B cannot make up for the delay by at once giving notice to A, for B, having been discharged by C's delay in giving him notice, cannot give effectual notice to A.

In regard to s. 49 (2), if A, B and C are successive indorsers of a dishonoured bill, and C's agent gives notice to A, either in his own name or in the name of C or of B, the notice will be valid and effectual.

### Who Benefits by Notice of Dishonour

49.—(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

Suppose A, B, C and D are successive indorsers of a bill, and that, on dishonour, D gives notice to A, and then indorses the bill to E. B, C and E each receive the benefit of the notice, for E is a "subsequent holder", while B and C are prior indorsers with a right of recourse against A.

### Form of Notice of Dishonour

49.—(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Notices of dishonour are construed liberally and scarcely a written notice would be held to be bad on the ground of insufficiency in form. Notice is adequate whether given orally or in writing or partly orally and partly in writing, provided the party receiving the notice can have no difficulty in understanding its purport and the bill is sufficiently identified.

### COMMON FORM OF NOTICE OF DISHONOUR

I hereby give you notice that a bill for £170 10s., dated the 1st of 19...., drawn by *James Brown* upon *Andrew Sims*, payable three months after date and indorsed by you has this day been dishonoured by acceptance. I request immediate payment of the said bill of £170 10s. plus expenses, 3s. 6d.

*Thomas Robinson*

4th September, 19....

Collecting bankers return unpaid bills or cheques to their customers with a covering memorandum that serves as a notice of dishonour.



## To Whom Notice must be Given

49.—(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

Although the Act does not specify *the place* at which notice must be given, it would appear that, where the party to be notified is a trader, notice is effectual if left at or forwarded to his place of business. If the party is not a trader, notice should be sent to or left at his private residence.

## When Notice is to be Given

49.—(12) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

If a bill is dishonoured on Monday and the holder, A, desires to give notice of dishonour to an indorser, B, who resides in the same town, A must deliver or post the notice so that it reaches B not later than Tuesday. If A and B do not live in the same town, A must post the letter of notice not later than Tuesday, unless there is no post on that day, when he must send off the letter by the first post thereafter.

S. 92 provides that no account need be taken of "non-business days" in estimating the correct time for giving notice of dishonour, so that, if A's bill is dishonoured on a Saturday, A need take no account of the Sunday in calculating the time he has for giving or sending off notice of dishonour.

The provisions of s. 49 (12) apply only *in the absence of special circumstances*, and evidence is admissible to show that notice was unavoidably delayed.

## Notice Given by a Party

49.—(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

In other words, each party who receives due notice is, for the purpose of giving notice to prior parties, placed in a position similar to that of the holder. Suppose A, B and C are successive indorsers of a bill, and C, the holder in whose hands it is dishonoured, gives due notice to B. B has thereafter the same time within which to give notice to A as if he (B) were the holder of the bill. But if B does not give due notice to A, A will be discharged, so C should give notice to both A and B if he wishes to be sure of his rights against them both. In other words, a holder who wishes to secure his rights against *all* prior parties should give notice to all, remote or immediate. But he must give such notice to each prior party within the same time as he is allowed for giving notice to his immediate party.

Similarly, an intermediate party can safeguard his rights against all prior parties only by himself giving *due* notice to them all, unless he knows that *due* notice has been given to all such parties by the holder, or is satisfied that notice will be duly passed on by the parties who precede him in order of liability.

## Bill in the Hands of an Agent

49.—(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

These provisions are of special importance to bankers, who frequently have to make use of the services of agents in presenting bills for payment. One effect is that the Head Office of a bank and each branch have the same time as any party liable within which to give notice of dishonour.

Suppose a bill payable in London is sent by a country branch to its London office for presentment for payment, and is dishonoured, notice of dishonour being sent off on the same day by the London Office to the country branch. The latter can send off notice to the holder within the time allowed by s. 49 (12), *supra*.

## Delay in Giving Notice

If the holder is unable, through no fault of his own, to give notice of dishonour within the time laid down in s. 49 (12), the delay is excused by s. 50 (1):—

50.—(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party

giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

If the holder does not know the address of the party to whom notice is to be given, he must do his best to find it, and delay caused by making the necessary inquiries will be excused. Delay will also be excused if the drawer or an indorser has given a wrong address.

Where the delay in giving notice is caused by the negligence of the party *to whom notice is sent*, then, although the notice will operate in favour of the sender and consequently make the recipient liable, the recipient will be unable to give an effectual notice to prior parties, and they will not be bound unless they have received *due* notice from some other party who is in a position to give effectual notice.

49.—(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

### When Notice is Dispensed with

50.—(2) Notice of dishonour is dispensed with—

- (a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged :
- (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment :
- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

The fact that a party entitled to notice has reason to expect that the bill will be dishonoured (*e.g.*, where he knows that the acceptor is dead or bankrupt) does not release the holder from the duty of giving him notice.

The giving of notice would be excused under s. 50 (2a) if the holder had gone to a party's place of business to give notice, but had found the place shut up or no one there to answer enquiries. On the other hand, the absence of an indorser's address does not relieve the holder of the duty of communicating with him, if

possible. So that, if the holder makes some enquiry, but does not take such steps as he reasonably might have done, the party entitled to notice will be discharged. Moreover, circumstances that excuse delay in giving notice of dishonour will not dispense with notice.

Waiver by an indorser of notice of dishonour, *e.g.*, by writing after his signature "Notice of dishonour waived", will operate in favour of all holders *subsequent* to that indorser.

Whether there is an *implied* waiver must be determined from the circumstances, but it must, in any case, have been made by the person sought to be charged. If the drawer of a bill tells the holder that it will not be paid on presentment, the statement may operate as an implied waiver of notice by the drawer, but it would not be effective against indorsers who had no notice of the waiver.

Waiver of notice may also be implied where a party who has not received due notice makes a promise to pay if the holder will give him time. But there will be no waiver if such a promise is made, or if part payment of the bill is made, *under a mistake of fact*. Thus, in *MacTavish v. Michaels*, 1912, an indorser was not given notice of dishonour, but, in the mistaken belief that she was a joint acceptor of the bill, she made a part payment to the holder. It was held that, as there was no waiver of notice, the indorser was discharged by the failure to give her notice, and was entitled to a refund of the money paid.

Although, in the case of the dishonour of a cheque by reason of insufficient funds, notice to the drawer is excused by virtue of clause (c) (4) of s. 50 (2), this clause does not excuse notice of dishonour to an indorser of the cheque.

The effect of clause 50 (2d) (2) was illustrated in *Caunt v. Thompson*, 1849, where the indorser of a bill became the executor of the acceptor. The bill was presented at maturity to the indorser for payment in his capacity of executor and was dishonoured by him. It was held that he was not, as indorser, entitled to notice of dishonour.

### Notice to Acceptor, Maker, Guarantor or Transferor by Delivery

S. 52 (3) (see p. 295) provides that notice of dishonour need not be given to the acceptor of a bill. Nor need notice be given to a person who is not a party but has guaranteed the due payment of the instrument by the party primarily liable; although it is desirable that notice should be given in such a case.

### NOTING AND PROTEST

When a bill has been dishonoured by non-acceptance or non-payment, it is sometimes necessary to obtain official proof that it has been properly presented and dishonoured.

## Noting

The first step in obtaining such proof is known as "noting" the bill, a process whereby a notary public (generally a solicitor), attests to the dishonour by the drawee or acceptor. To do this, the notary's clerk presents the bill a second time, and, if it is again dishonoured, makes a note or "minute" consisting of the initials of the notary, the date, the charges for noting and a reference or mark to the register of the notary, where a copy of the bill and the particulars of the noting are kept. He also attaches to the bill a slip on which is written the answer, if any, given by the drawee or acceptor.

## Protest

A PROTEST is a declaration by a notary under seal that a specified bill (a copy of which is usually given on the back) has been refused acceptance or payment, and that the holder intends to recover all the expenses incurred by him in consequence thereof.

Protest is accepted as evidence of dishonour in any country. In this country, it is compulsory on the dishonour of a foreign bill [s. 51 (2)], while it is desirable to protest even an inland bill if it bears foreign indorsements, so that the foreign parties can be given proof of dishonour and recourse preserved against them.

Although a bill is usually noted first and protested later, noting is not an essential preliminary to protest. A bill may be protested within the prescribed time without first having been noted. The advantage of noting is that, once it has been done, the more formal protest may be completed at leisure as of the name date as the noting. (See s. 93 below.)

51.—(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

- (a) The person at whose request the bill is protested;
- (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

## SPECIMEN PROTEST FOR NON-ACCEPTANCE

On this the 7th day of September, One thousand nine hundred and ....., at the request of *James Brown*, of the City of *Birmingham*, *Grocer*, and holder of the original bill of exchange, a true copy of which is on the other side written, I, *Thomas Robinson*, of the said City, Notary Public, by lawful authority duly admitted and sworn, did produce and exhibit the said original bill of exchange to *Henry Abbott*, on whom it was drawn, at 17 *East Street*, *Northtown*, for his acceptance, and demanded acceptance thereof, to which he replied that "*Reference should be made to the Drawer, William Burns*".

Wherefore I, the said Notary at the request aforesaid, did protest and by these presents do solemnly protest against the drawer of the said bill of exchange and all parties thereto, and all others whom it doth or may

concern, for exchange, re-exchange, and all costs, damages, charges and interest already incurred and to be hereafter incurred by reason of the non-acceptance of the said bill of exchange.

Thus done and protested at *Birmingham*,  
in the presence of—

*Andrew Bennett,*  
21 Park Drive,  
*Birmingham,*  
Clerk.

*Fred Barnes,*  
11 The Causeway,  
*Birmingham,*  
Clerk.

Witnesses.

Dated this 7th Day of *September*,  
One thousand nine hundred and

.....  
Which I attest,

*Thomas Robinson,*  
Notary Public,  
L. 179.

SEAL

The protest of a bill for non-payment is the same except for necessary modifications.

### When Inland Bills are Noted and Protested

51.—(1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

A holder who chooses to *note* an inland bill on dishonour may recover any expenses so incurred from any parties liable on the bill (s. 57, p. 225). But the expenses of *protest* of an inland bill can be recovered only where protest is necessary according to the Act, viz: (a) as a preliminary to acceptance of the bill for honour; (b) as a preliminary to payment of the bill for honour; (c) for purposes of summary diligence in Scotland; (d) after dishonour by non-payment by an acceptor for honour. These matters are dealt with below.

### Noting and Protest of Foreign Bills

51.—(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

A foreign bill that has been accepted as to part must be protested in respect of the unaccepted balance [s. 44 (2)].

S. 51 (2) makes it *compulsory* to protest a foreign bill *once* only, either on dishonour by non-acceptance or on dishonour by non-payment, but, by s. 51 (3), the holder has the option of

obtaining a second protest on the dishonour of a bill by non-payment :—

51.—(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

A protest such as is provided for by this sub-section may be necessary in order to charge a foreign drawer or indorser in his own country, for in most foreign countries protest for non-acceptance does not excuse protest on subsequent non-payment.

Although the drawer and indorsers are discharged by failure to protest a foreign bill, the liability of the acceptor is unaffected, for by s. 52 (3) :—

52.—(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

### Time Allowed for a Protest

S. 51 (4) of the Act of 1882, as amended by s. 1 of the Bills of Exchange (Time of Noting) Act, 1917, provides that :—

51.—(4) Subject to the provisions of this Act, when a bill is noted or protested, *it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day.* When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Although noting must be effected not later than the business day following the day of dishonour, s. 93 permits the formal protest (where it is required) to be extended at any subsequent time and antedated to the date of noting :—

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

(Refer to ss. 65 to 68.)

### Where Protest must be Made

The general rule is that a bill must be protested at the place of dishonour, but s. 51 (6) specifies two exceptions :—

51.—(6) A bill must be protested at the place where it is dishonoured: Provided that:—

- (a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:
- (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

In regard to clause (a), suppose the holder of a bill who resides in Liverpool posts the bill to the drawee in Burnley for acceptance, and that the bill is returned dishonoured to the holder by post, reaching him on the day following dishonour. The bill may be protested in Liverpool on that day, or, if it is not received back during business hours, not later than the succeeding business day.

In regard to clause (b), suppose a bill drawn on X in Burnley, but payable in Liverpool, is dishonoured on due presentment for acceptance at Burnley. On the day of maturity it must be protested for non-payment in Liverpool without any further presentment to, or demand upon, the drawee X.

### When Protest is Excused : Delay in Protesting

51.—(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

There is thus no need to protest a bill in the circumstances, prescribed by s. 50 (2), where notice of dishonour is dispensed with. The fact that delay in protesting a bill is excused does not dispense with protest, and this must be made as soon as the cause of delay ceases to operate.

### Householder's Protest

To cover circumstances where the services of a notary cannot be obtained, s. 94 provides that :—

94. Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

### SPECIMEN HOUSEHOLDER'S PROTEST

Know all men that I, *James Brown* (householder), of *17 East Street, Northtown*, in the county of *Northshire*, in the United Kingdom, at the request of *Thomas Robinson*, there being no notary public available, did on the *17th* day of *June*, 19..., at *11 The Close, Northtown*, demand payment (or acceptance) of the bill of exchange hereunder written, from *Henry Arnold*, to which demand he made answer "*Refer to the Drawer*", wherefore



I now, in the presence of *Andrew Burns* and *Fred Jones*, do protest the said bill of exchange.

(Signed) *James Brown.*

WITNESSES :

*Andrew Burns,*  
11 East Street, Northtown,  
Grocer.

*Fred Jones,*  
143 North Road, Northtown.  
Clerk.



[The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.]

## Protest of a Lost Bill

The loss or destruction of a bill does not excuse the holder from his duty to protest, for by s. 51 (8) :—

51.—(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

## Protest for Better Security

51.—(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

A protest of this kind does not give the holder any right to sue the drawer or indorsers until the bill falls due and is dishonoured. It is, however, a necessary preliminary to the acceptance of the bill for honour. (See below.)

## How Damages on Dishonour are Assessed

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows :

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

- (a) The amount of the bill :
- (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
- (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

- (3) Where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

[Interest proper is defined in s. 9 (3).]

"Re-exchange", under s. 57 (2), is the loss resulting from the dishonour of a bill in a country different from that where the bill was drawn or indorsed. It is made up of the sum for which a sight bill (drawn at the time and place of dishonour, at the *then rate of exchange*, on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonour (a) the amount of the dishonoured bill *plus* (b) the expenses consequent on its dishonour. The latter include the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the cost of the stamp.

A bill drawn for the re-exchange is called a "re-draft" and any indorser who pays a re-draft may in like manner draw upon an antecedent party.

Suppose that Brown of New York sends a bill for £1,000 payable in London to his creditor, Robinson of Liverpool. On presentment for payment, the bill is dishonoured, and the expenses of noting, together with interest, amount to £4. Robinson can claim from Brown £1004, and may obtain payment thereof by drawing a sight bill (*i.e.*, a "re-draft") on Brown for that amount in dollars which will yield £1004 at the rate of exchange ruling on the date of dishonour. Thus, if the rate of exchange at which Robinson's banker would buy sight bills on New York, on the date of dishonour was \$3.86 per £1, the re-draft will be drawn for :

$$$(1004 \times 3.86) = \$3880 \text{ (approx.)}.$$

### Referee in Case of Need

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

The referee, sometimes described as a "drawee in case of need" or simply as a "case of need", is not a party to the bill (although he may become a party thereto by accepting for honour as prescribed in s. 65), and presentment to a referee in case of need after dishonour by non-acceptance or non-payment is *optional* and not compulsory.

## ACCEPTANCE AND PAYMENT FOR HONOUR

## Acceptance for Honour

65.—(1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn ;

(3) An acceptance for honour *supra* protest in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour ;

(b) be signed by the acceptor for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

An acceptance of this kind is known as an acceptance for honour *supra protest*, since it can be admitted only after the bill has been protested, either for non-acceptance or, *where acceptance has been obtained*, for better security. An overdue bill cannot be accepted for honour.

Such an "intervention for honour", as it is called, has the effect of staying the holder's action against the other parties to the bill, and may be made, *with the holder's consent*, by *any* person who is *not already liable on the instrument*. This implies that the drawee can accept for honour although he has previously refused to accept the bill in his capacity as a drawee, provided the consent of *the holder* is obtained. But unless the holder's consent is obtained, the holder may exercise his usual remedies against any party to the bill.

It is usual for the acceptor to state for whose honour he accepts ; if he does not do so, his acceptance will be deemed to be given for the honour of the drawer.

Although it is not legally necessary, an acceptance for honour is *usually* attested by a notarial act of honour recording the transaction, and this is *always* done where it may be necessary to charge a foreign drawer or indorser in his own country.

S. 65 (5) operates in favour of the holder, for by making the date of noting for non-acceptance, and not the date of acceptance for honour, the sighting date of a bill payable after sight, it ensures that the holder does not suffer any postponement of the due date.

## Liability and Rights of the Acceptor for Honour

66.—(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

The bill must, first of all, be presented to the drawee for payment before it is presented to the acceptor for honour because, although, at the time of dishonour by non-acceptance, the drawee may not have had sufficient funds in his hands to pay the bill, he may have received such funds by the time the bill is due for payment.

The liability of an acceptor for honour may be illustrated in the case where a bill, negotiated by indorsement to A, B, C and D respectively, is accepted by X for the honour of B. X is liable to C and D, but not to B or A or to any party prior to A.

## Protest for Non-Payment is First Necessary

67.—(1) Where a dishonoured bill has been accepted for honour supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstances which would excuse delay in presentment for payment or non-presentment for payment. (See s. 46.)

Although, by this section and by s. 66, a bill must be *protested* for non-payment before it is presented to the acceptor for honour, it is sufficient, by s. 93, if it is merely noted, provided the protest is subsequently extended as of the date of noting.

Since s. 15 (see p. 226) provides that presentment to a referee in case of need is *optional*, the holder may demand payment from the other parties without first applying to the case of need.

The effect of ss. 66 and 67 together is that the right to sue the acceptor for honour arises only if the following conditions have been fulfilled: (a) there has been due presentment of the bill to the drawee for payment—but if the bill is drawn payable elsewhere than at the residence or place of business of the drawee, and has already been dishonoured by non-acceptance, there is no need to present it for payment to the drawee: it must be protested

for non-payment at the place where it is expressed to be payable without further demand on the drawee [Section 51 (6b)]; (b) the bill has been protested (or noted as a preliminary to protest) for non-payment; (c) the acceptor for honour has received notice of these facts; (d) the bill has been presented to the acceptor for honour for payment, and payment has been refused.

The position of an acceptor for honour thus differs from that of an ordinary acceptor. Presentment for payment is *not* necessary to make the latter liable unless his acceptance expressly provides that such presentment shall be made, nor is notice of dishonour or protest of a bill necessary as a condition precedent to the right to sue an ordinary acceptor.

### Dishonour by Acceptor for Honour

67.—(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

This is one of the four cases in which protest of an inland bill (as well as of a foreign bill) is *compulsory*. In the event of dishonour by an ordinary acceptor, protest is *optional* in the case of an inland bill, but it is a necessary preliminary to action on a foreign bill.

### Payment for Honour

The second form of intervention for honour is known as "payment for honour *supra* protest":—

68.—(1) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

Unlike acceptance for honour, payment for honour may be made by *any person*, including a party already liable on the bill, and whereas there can be no acceptance for honour of an overdue bill, payment for honour necessarily takes place at or after the maturity of the instrument, *i.e.*, after the bill has been dishonoured by non-payment by the acceptor or by the acceptor for honour (if any). Moreover, while a notarial act of honour, though usual in practice, is not legally *essential* in the case of acceptance for honour,

it is *compulsory* in the case of payment for honour, in order to distinguish the payment for honour from a mere voluntary payment, and to preserve the rights of the payer for honour against the party for whose honour he pays.

Finally, the consent of the holder to payment for honour is *not* necessary, whereas he has the *option* of refusing an acceptance for honour. The holder cannot refuse payment for honour without prejudicing his rights on the instrument, for by s. 68 (7) :—

68.—(7) Where the holder of a bill refuses to receive payment *supra protest* he shall lose his right of recourse against any party who would have been discharged by such payment.

Suppose A draws a bill on B payable to C, which is successively indorsed by C, D, and E to F, the holder. X offers to pay F for the honour of C. If F refuses to accept this payment, he loses his rights against C, D and E, but he will still retain his right of recourse against A and B, for they would not have been discharged by the payment of the bill by or on behalf of C.

### Discharge of Parties by Payment *Supra Protest*

68.—(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

Although neither acceptance nor payment for honour needs the consent of the person for whose honour *intervention is made*, the acceptor or payer for honour nevertheless has a right of action against the person whose honour is protected as well as against any parties who are liable to that person.

In illustration of this, suppose a bill drawn by A on B payable to C, is successively indorsed by C, D, and E, to F the holder, and that, on dishonour, X pays *supra protest* for the honour of C. This payment discharges D and E, while the payer for honour, X, stands in the same position as C, the person for whose honour he paid, *i.e.*, he has a right of recourse against A and B, but he must fulfil any duties of C in order to complete his right of action against A and B. In addition, X has a right of recovery against C.

If a person intervenes and pays a bill for honour of the acceptor, he has no rights against any parties except the acceptor. But if a bill is accepted for the honour of the drawer and the acceptor for honour refuses to pay, a payer for honour of the drawer can recover from the drawer, but he has no right of action against

the acceptor for honour, for the latter is not a party who is liable to the drawer.

When the acceptor for honour pays a bill, his payment discharges all parties subsequent to the party for whose honour he *accepted* the bill.

### Re-Acceptance of Bills

In this country, a bill cannot be re-accepted in order to postpone or extend its due date. A new contract is necessary under a fresh stamp. If it is possible to get the signatures of all the parties liable on the original bill, a new bill should be drawn, otherwise, if the holder is willing to allow the acceptor time in which to pay, the bill should be presented when due, noted or protested as required, and held until the agreed date, notice of dishonour being given to all parties.

## CHAPTER 20

### DISCHARGE OF A BILL : CONFLICT OF LAWS

A bill may be said to be discharged when the rights and liabilities of all the parties thereon come to an end. This may happen in five ways : (1) by payment in due course ; (2) when the acceptor becomes the holder in his own right ; (3) by renunciation by the holder of his rights against the acceptor ; (4) by cancellation by the holder or his agent ; (5) by material alteration without the consent of any party liable.

#### Discharge by Payment in Due Course

59.—(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged ; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Unless the holder is willing to receive payment in any other form offered by the acceptor (e.g., by setting-off a debt), payment must be made in legal tender.

Since "payment in due course" means payment made *at or after maturity*, payment by the acceptor *before* that date will not discharge the instrument, though it may operate to discharge the rights of parties thereto as between themselves. Hence, if a bill so paid is subsequently reissued by the acceptor in pursuance of his rights under s. 37, any person who takes the bill will have a right of action against any parties whose names appear on the instrument.

Payment of a bill is not made "in due course" unless it is made to the *holder* of the bill or to a person duly authorized to receive payment on his behalf. Hence, payment of a bill (other than a cheque) made in good faith to a person who claims under a forged indorsement will not discharge the acceptor from liability to the true owner; for a person who holds a bill under a forged indorsement is not a holder, he is a wrongful possessor. But if a bill when stolen is payable to bearer, the thief is a holder and payment to him or to his transferee in good faith is a valid discharge, for, by s. 38 (3b), a person whose title is merely defective can give the payer a valid discharge.

This general rule that payment in due course cannot be made to a person who holds under a forged indorsement does not apply to the payment of cheques by a banker, a matter which is treated in Chapter 15.

Payment in due course must be made by or on behalf of the drawee or acceptor, and payment by another party does not discharge the bill. If a bill payable to a third party is paid by the drawer, he can still proceed against the acceptor; but the drawer cannot reissue a bill that he has paid unless it is payable to his own order. On the other hand, an indorser who pays can still claim against any prior indorser, or against the drawer or the acceptor, and he may reissue the instrument if he thinks fit.

Suppose a bill drawn by A and accepted by B is negotiated from the payee C to D, E, and F, who successively indorse. When the bill is presented by F to B for payment, it is dishonoured, and F applies to the drawer, A, by whom the bill is paid. A can claim against B, but he cannot reissue the bill. But if the bill is paid by indorser D, he may, if he thinks fit, strike out his own indorsement and the indorsements of E and F, and again negotiate the instrument. Moreover, if the bill was originally payable to the order of the drawer A, and was paid by him, A would stand in the same position as any other indorser who paid the instrument, i.e., he could strike out his own indorsement and any subsequent indorsements and again negotiate the bill. If a bill is overdue when it is reissued, no person taking it can become a holder in due course.



The general rule that a bill to be discharged by payment in due course must be paid by the drawee or acceptor, is subject to the exception that an accommodation bill, by virtue of s. 59 (3), may be discharged by payment *by the party accommodated*. Suppose a bill drawn by A and accepted by B for the accommodation of a payee C is indorsed to D. Payment by C, the party accommodated, to D, or to any other holder, will discharge the bill, and C will have no right of recourse against either A or B.

Part payment of a bill by the acceptor or the party accommodated operates as a discharge *pro tanto*.

### Acceptor a Holder in his Own Right

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

When a bill is negotiated and comes into the hands of the acceptor at or after maturity, as holder in his own right, he is in the position of being both primarily liable and yet possessing all rights in the instrument. The rights and liabilities, being vested in the same person, cancel each other, and the bill is discharged.

But if the acceptor holds the bill at maturity merely as executor, trustee or agent of another person (*i.e.*, not in *his own right*), the bill is not discharged. Moreover, the acceptor in such a case would have every right to reissue the bill if it came into his hands (as executor, etc.) *before* its maturity.

### Renunciation of Rights by the Holder

62.—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

Thus, a bill is discharged if the holder at maturity tells the acceptor that he renounces all claims against him, *and* gives up the bill to him, or if the holder *in writing* absolutely renounces his rights *against the acceptor*. But renunciation by the holder of his rights *against any other party* will not discharge the bill. Suppose that A is the payee and first indorser of a bill, and that B, C, and D are subsequent indorsers. If D renounces his rights against A, the renunciation will operate to discharge A and any indorsers subsequent to A, *i.e.*, B and C, but it will not discharge the drawer and acceptor, who will still remain liable to D and to any subsequent holder.

A renunciation must be *absolute* and *unconditional*. A renunciation that is conditional on the happening of an event, *e.g.*, a person's death, does not become effective merely by the happening of that event.

### Effect of the Cancellation of a Bill

63.—(1) Where a bill is intentionally cancelled by the holder or his agent and the cancellation is apparent thereon, the bill is discharged.

The term "cancellation" is not defined in the Act, but presumably it covers any method which indicates an unmistakable intention to discharge the bill. If the bill is not actually destroyed, cancellation should be made effective by deleting with a pen the signature of the drawer, and of the acceptor (if any). As an additional safeguard, the word "Cancelled" may be written or stamped across the face of the bill.

To be effective, cancellation of a bill must be apparent on the face thereof, and, if it is not so apparent, the bill will be valid in the hands of a holder in due course.

This sub-section provides for the discharge of *the whole bill* by cancellation, but s. 63 (2) provides in addition for the discharge of *any party* to a bill by the intentional cancellation of his signature by the holder or his agent :—

63.—(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

Cancellation of the signature of a party will not operate as a discharge of the whole instrument. So, if A, B, C, and D are successive indorsers of a bill, and the holder E cancels B's indorsement, B, C, and D are discharged, but A and all prior parties remain liable.

To be operative, any such cancellation must be *intentional*, for by s. 63 (3) :—

63.—(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative ; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

This means that, although the apparent cancellation of a signature to a bill is *prima facie* deemed to be intentional, evidence may be admitted to prove that the cancellation was unintentional, or made by mistake, or without authority.

In accordance with the provisions of this sub-section, the mere fact that the paying banker cancels the drawer's signature on a cheque does not constitute an irrevocable discharge. The banker may mark the cheque "Cancelled in error" and return it, provided

that he does so within the customary time in which he is allowed to decide whether he will pay or return the cheque. (See p. 179.)

### Discharge by Reason of Material Alteration

S. 64 which deals with the discharge of a bill by material alteration has been discussed in Chapter 12.

### Bills and the Limitation Act, 1939

Since a bill of exchange is a simple contract, any action thereon is barred by the Limitation Act, 1939, after the lapse of six years from the time when the right of action first arose, unless such right is renewed by a written promise to pay, or by an acknowledgment of the existence of the debt (evidenced by the bill), signed by the party to be charged or by his authorized agent, or by any payment on account of principal or interest.

If the right of action on a bill is thus barred, the holder as a rule has no remedy against any parties to the instrument.

So far as the acceptor is concerned, the right of action on a bill payable after date or after sight arises when it becomes due. But where, by the terms of the acceptance, the bill *must* be presented for payment, the time runs from the date when the bill is so presented and payment is refused.

In like manner, wherever the holder has to perform certain statutory duties before the right of action is complete, then the date when the cause of action first arises depends on the performance of those duties. As regards the drawer or an indorser, the giving of due notice of dishonour is essential to the completion of the holder's right of action against them, so, as against these parties, the limiting period begins to run from the date on which notice of dishonour is given or despatched by the holder.

In the case of a bill *payable on demand*, the time begins to run in favour of the drawer from the date of issue.

### Discharge of a Person in the Position of Surety

Where a person signs a bill or note as a surety for another person, a holder who learns of this relationship of principal and surety must exercise care in his dealings with such parties. Otherwise, if, without expressly reserving his rights against a surety, he agrees to give time to the principal debtor, or waives his rights against him, the surety will be freed from liability.

Moreover, the holder must not disregard the fact that, in effect, the drawer and indorsers of a bill are sureties for the acceptor, and that the indorsers are sureties for the drawer, the second indorser surety for the first indorser, and so on in order of liability.

For these reasons, the holder of a bill must not enter into any arrangement with a prior party that would conflict with the rights

of any subsequent party as a surety. For example, the holder will release the drawer and any indorsers if, without the knowledge or consent of such parties, he makes a binding agreement with the acceptor to give him time within which to pay, or if he takes from the acceptor a new bill payable at a future time instead of a bill which has matured, or if, at the express request of the acceptor, he delays presentment of the bill for payment. In like manner, a holder who agrees to give time to the first indorser discharges all subsequent indorsers (who are in the position of sureties for the first indorser), but does not discharge the drawer or acceptor.

Before an agreement to give time can operate as a discharge, it must be a binding agreement founded on consideration. But so long as the party seeking to be discharged can prove the existence of a possibly prejudicial agreement between the holder and the principal debtor, it does not matter whether he was in fact prejudiced by the arrangement or not.

## CONFLICT OF LAWS

Conflict of laws in regard to bills of exchange arises because our law concerning bills differs from that of other countries. In this regard, s. 72 provides:—

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:
  - (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- (2) Subject to the provisions of this Act, the interpretation of the drawing, in . . . acceptance, or acceptance *supra* protest of a bill, . . . determined by the law of the place where such contract is made.
- Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- (4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

### Requisites as to Form

By s. 72 (1), a bill which is valid as regards form according to the law of its *place of issue* will be treated as valid in the English Courts; but a bill which is not valid in form according to the law of the place of issue will, if negotiated or paid here, be treated as invalid by the Courts in this country also.

This principle is subject to two exceptions. S. 72 (1a) provides that a bill issued out of the United Kingdom is not invalid by reason only that it does not bear the stamp required in the country of issue. But the Stamp Act, 1891, requires a bill issued abroad to be stamped according to English law before it can be dealt with in this country, although the title of a *bona fide* holder is not affected because the bill was not stamped before being dealt with in this country, provided that it was duly stamped when negotiated to him.

The second exception, provided for in s. 72 (1b), is that a bill conforming to the requisites as to form required by the law of the United Kingdom, but contravening those of the country of issue, will be valid in the hands of a holder against all persons who became parties thereto *in the United Kingdom*. But no action can be taken on such a bill against those who were parties to it in the country of issue.

As regards transactions on the bill *subsequent* to its issue, s. 72 (1) provides that their validity is to be determined according to the law of the place where they are made. If an inland bill is negotiated abroad, any foreign indorsement thereon must comply with the law of the country where it was written, otherwise no action can be brought against the indorser in the English Courts, even though the indorsement satisfies the law of the United Kingdom. But the person paying the bill need only satisfy himself that the *indorsements conform to English law*.

## Due Date

S. 72 (5) is important in the case of bills payable in countries that have no days of grace. Thus a bill drawn in the United Kingdom payable in Paris takes no days of grace as no days of grace are allowed in France, whereas days of grace are allowed on a bill drawn in France payable in this country.

## Consideration

No action on a bill can succeed if it is based on a consideration that is void at English law, even though the consideration is valid in the place where the bill was drawn or given.\* Thus, in *Moulis v. Owen*, 1907, it was held that no action could be taken by the payee of a cheque that had been given in Monte Carlo (where gaming is not illegal) in consideration of a loan made for the purpose of gambling, for according to English law such consideration is void.

But even though the issue or negotiation of a bill may have been tainted with a void consideration, this will not necessarily affect the rights of a *subsequent* holder for value, and the latter can generally enforce payment even though he had notice of the fact that the earlier consideration was void. If, however, the consideration was *illegal*, a subsequent holder for value cannot enforce payment against parties prior to the illegality unless he can prove that he had no notice thereof.

Where a bill is signed by a person in pursuance of an agreement made by him after coming of age to repay a loan contracted during his infancy, the bill is *completely void*, and cannot be sued upon in any way.

## CHAPTER 21

### PROMISSORY NOTES

THE provisions of the Bills of Exchange Act, 1882, apply with necessary modifications to promissory notes (including bank notes), while ss. 83 to 89 of the Act contain provisions specially applicable to these notes.

#### Legal Definition of a Promissory Note

83.—(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

## PROMISSORY NOTE PAYABLE ON DEMAND



£50

LONDON, 17th September, 19.....

On demand I promise to pay to James Brown or order the sum of fifty pounds for value received.

THOMAS ROBINSON.

## PROMISSORY NOTE PAYABLE AFTER DATE



£100

LONDON, 17th September, 19.....

Two months after date I promise to pay to James Brown or order the sum of one hundred pounds for value received.

THOMAS ROBINSON.

## PROMISSORY NOTE AFTER DATE PAYABLE WITH INTEREST AT A PARTICULAR PLACE



£100

LONDON, 17th September, 19.....

Three months after date I promise to pay the Northern Bank, Limited, or order, at their North-town Branch, the sum of one hundred pounds with interest thereon at the rate of 5% per annum until payment.

THOMAS ROBINSON.

The definition of a promissory note follows closely the definition of a bill of exchange, as analysed in Chapter 10.

First, the promise must be *unconditional*, so that a note running "Nine years after date I promise to pay C £100 provided X shall not return to England" is invalid as a promissory note because the promise to pay is subject to a condition. Secondly, the instrument must be payable at a *fixed or determinable future time*, so that a note payable on a contingency is invalid, and the happening of the event does not cure the defect. Thus a promissory note payable "Three months after the death of X" is valid because the time of payment is determinable although uncertain, but a note payable "Three months after the marriage of X" is invalid, for the marriage may never take place.

Thirdly, the note must promise payment of a *sum certain in money*, which, by s. 9, includes a sum payable with interest or by

stated instalments or according to an indicated or determinable rate of exchange. A specimen of a note payable with interest is given on p. 239. Sometimes the phrase "with lawful interest" is included instead of a precise indication of the rate to be charged. The rate of interest will then be such as is agreed between the parties, but if it is harsh or unconscionable, the Court will enforce payment of interest against the debtor only at what it regards as a *reasonable* rate.

Although the legal definition must be complied with, a promissory note need not be in any stereotyped form. So, a note running, "I, Thomas Robinson, promise to pay" is in order if it is made out by Thomas Robinson, even though his signature does not appear in the usual place at the foot of the note. Similarly, a note running, "I do acknowledge myself to be indebted to A in £100 to be paid on demand for value received" is valid as a promissory note, since the words "to be paid" embody a promise to pay.

An I.O.U. (e.g., "I.O.U. £20 for value received, Thomas Robinson") is not a promissory note, unless it contains a promise to pay.

In *Kirkwood v. Carroll*, 1903, a promissory note containing the following clause was held to be valid: "No time given to, or security taken from, or compensation entered into with, either party, shall prejudice the rights of the holder to proceed against any other party".

A note payable to the maker's order [s. 83 (2)] would be one running: "On demand I promise to pay myself or order", but, as provided in the section, such an instrument is not valid as a promissory note unless and until it is indorsed by the maker. If the maker then indorses in blank, the note becomes payable to bearer, but if he indorses specially, the note becomes payable to order.

Similarly, a note made by the maker in favour of himself and another person, or a *joint* note made by two or more persons in favour of one of their number, is not a valid note until it is indorsed by the payee who is also a maker. On the other hand, a *joint and several* note signed by two or more makers is valid if payable to one of their number even if the payee has not indorsed. (See p. 242.)

### Inland and Foreign Promissory Notes Distinguished

83.—(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

For the purposes of this section, the British Islands include the Isle of Man and the Channel Islands, as provided in s. 4. Hence, examples of foreign notes would be: (a) a note made in



## PROMISSORY NOTES

London payable in Paris; (b) a note made in Berlin but payable in London; (c) a note made in any foreign place but with no place of payment indicated.

By virtue of the express exception in s. 89 (4), a foreign note does not require protest on dishonour, and differs in this respect from a foreign bill. But it may be advisable to protest a foreign note on dishonour in order to secure the liability of a foreign party in his own country.

**Bank Notes**

A bank note is as a promissory note made by a banker, payable to bearer on demand.

In general, the provisions of the Act concerning promissory notes payable on demand apply to bank notes, but there are one or two minor points of difference.

The right to issue bank notes in England and Wales is, by the Bank Charter Act, 1844, confined to the Bank of England. In Scotland and Ireland, other banks have the right of issue. Bank notes may be reissued, whereas a promissory note other than a bank note is discharged when once paid in due course by or on behalf of the maker and cannot be reissued. Bank of England notes are not ordinarily reissued by the Bank of England, but Scotch and Irish bank notes are reissued.

Bank of England notes of £1 and 10s. are legal tender in England, Wales, Scotland and Northern Ireland. The Bank's £5 notes are legal tender in England and Wales only. Its notes of higher denomination were all called in in 1945, and are no longer legal tender.

**"Delivery" of a Promissory Note**

As in the case of a bill of exchange, a valid delivery of a promissory note in accordance with s. 21 is necessary to render the maker liable, for by s. 84:—

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Hence, the maker of a promissory note who can prove that he did not deliver the note is not liable thereon. (See Chapter 12.)

**Joint, and Joint and Several, Promissory Notes**

85.—(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

## JOINT PROMISSORY NOTE

£200

LONDON, 17th September, 19.....



On demand we promise to pay James Brown or order the sum of two hundred pounds for value received.

THOMAS ROBINSON.  
JOHN CHAMBERS.

## JOINT AND SEVERAL PROMISSORY NOTE

£100-10-0

LONDON, 17th September, 19.....



Three months after date we jointly and severally promise to pay James Brown or order the sum of one hundred pounds, ten shillings, with lawful interest thereon.

THOMAS ROBINSON.  
JOHN CHAMBERS.

A note signed by two or more makers is a joint and several note only if it is drawn either in the form provided for in s. 85 (2), i.e., "I promise to pay" followed by two or more signatures, or in the form "We *jointly* and *severally* promise to pay", followed by the signatures of the makers. (See specimen above.)

A note running "I, John Brown, promise to pay", signed by John Brown and another person Smith, is the note of John Brown only. Although Smith is not liable as a co-maker, he is liable as an indorser under s. 56.

When two or more makers accept *joint* liability on a note, each is liable for the full amount, but the holder cannot recover in all more than the amount of the note, and he has only *one right of action*. He may sue all the makers together or any of them individually, but, once he obtains judgment against one, he has no further remedy against the others, whether he recovers or not. Consequently, if action has to be taken on a *joint* note, all the makers should be sued together.

With a *joint and several* promissory note, however, the holder may sue the makers together or one at a time until he has received the amount of the note.

If one maker of a joint note dies, his estate is freed from liability; but, if the note is joint and several, the deceased's estate remains liable until the note is paid.

One maker of a joint or of a joint and several note who is compelled to pay it may look to his co-maker or co-makers for a contribution, and, if one maker of a joint or joint and several note is

sued, he may insist upon his co-maker or co-makers being introduced as a co-defendant or co-defendants in the action.

A joint and several promissory note differs from a bill of exchange accepted by two or more drawees in that the parties primarily liable on the note (*i.e.*, the joint makers) are jointly and severally liable, whereas the joint acceptors of a bill of exchange (*i.e.*, the parties primarily liable) are liable only jointly and cannot in any circumstances be liable severally.

### When a Note Payable on Demand is Overdue

86.—(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

By s. 10, a promissory note, like a bill of exchange, is payable on demand when expressed to be payable on demand, or at sight, or on presentation, or when no time for payment is expressed therein. The Act does not provide that the maker of a note is discharged to the extent that he suffers damage through delay in presentment, as in the case of the drawer of a cheque. (See p. 126.)

"Reasonable time" does not in practice mean the same thing in regard to a note as it does in regard to a bill. First, because promissory notes issued by the banks (*i.e.*, bank notes) may be in circulation for a long time before being presented for payment; secondly, because promissory notes are frequently taken as cover for an advance, and, in estimating reasonable time, the character of the instrument as a continuing security must be taken into account. Hence, while twelve days has been held to be an unreasonable time before presentment of a cheque, it has been held that ten months is not an unreasonable time before presentment for payment of a note on demand held as a continuing security.

### Presentment for Payment

A promissory note does not require acceptance. The rules regarding presentment for payment are thus set forth in s. 87:—

87.—(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

(Compare these with ss. 52, 45 and 46.)

A note bearing the words "Payable at the Northern Bank, Northtown", under the maker's signature, and not in the body of the note, need not be presented at the place indicated in order to render the maker and indorsers liable, though to retain the liability of the indorsers, the note must be presented to the maker somewhere.

In other respects the rules governing presentment for payment contained in s. 45, and also the circumstances in which presentment for payment is excused as set forth in s. 46, apply to promissory notes.

### Liability of the Maker

88. The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor;
- (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(Compare ss. 54 and 55.)

The maker of a promissory note is the principal debtor or the party primarily liable on the instrument, and in this respect he differs from the drawer of a bill. In general, his liabilities and obligations correspond with those of the *acceptor* of a bill.

The main distinction between a note and a bill is that the maker of a note is, and remains, the party primarily liable thereon, whereas the drawer of a bill becomes secondarily liable when the drawee accepts and so assumes the primary liability.

In addition, there are the differences that (a) a note cannot be made conditionally, whereas a bill may be accepted conditionally; (b) the maker and payee of a note are immediate parties in direct relationship with each other, whereas the acceptor and payee of a bill have no direct relationship (except where the bill is payable to the drawer's order); (c) the maker of a note is discharged if the note is not presented for payment at the place mentioned in the body of the instrument, whereas the acceptor of a bill is not discharged by the omission to present at the place of payment, unless it is expressly stipulated that he will be discharged if the bill is not presented for payment at the place indicated. [Cf. s. 52 (2).]

In the event of non-payment of a note, the measure of damages

recoverable from the maker is determined as provided by s. 57. (See Chapter 19.)

### Persons who sign as Sureties

A bank sometimes advances money to a customer against a joint and several promissory note signed by him and one or more other persons who are regarded as sureties for the due payment of the instrument by the customer accommodated. *Prima facie*, each person so signing is a *principal* liable for the due payment of the instrument, but any person who, to the knowledge of the creditor, signs a note as a surety may evade liability on proving that the creditor has not respected his position as a surety. In such circumstances, the ordinary rules relative to suretyship apply, and any special arrangement made without the surety's knowledge by the creditor with the principal debtor in regard to payment, or any time given to the debtor, will discharge the surety.

Thus, in one case, a joint and several promissory note was signed by A and B, B being merely a surety for A. The holder X, who knew of the relationship between the parties, arranged, without B's knowledge, to give A, the principal debtor, extra time in which to pay the note. It was held that B was discharged in respect of his liability on the instrument.

### Promissory Notes and the Law Relating to Bills

89.—(1) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to the drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *supra* protest;
- (d) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

By this section, the provisions of the Act respecting the calculation of due date (including the provisions respecting days of grace) apply to promissory notes as they do to bills of exchange. As a promissory note is not accepted, the period of a note payable after sight is deemed to begin to run from the date on which the instrument is first exhibited to the maker.

## When a Bill can be Treated as a Promissory Note

5.—(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

An instrument which can be treated as a promissory note need not be presented for acceptance, and, so far as the drawer is concerned, the holder is freed from his liability to prove presentment of the note for payment and to give the drawer notice of dishonour.

This most frequently happens when the drawer and drawee of a bill are the same person, *e.g.*, when the Manchester office of a firm draws a bill on the London office. In such a case, the holder may treat the instrument as a note payable in London of which the Manchester branch is maker, so that he need not present the instrument for acceptance, or give notice of dishonour to the Manchester branch if the instrument is not paid at maturity. Similarly, if the directors of a joint-stock company draw a bill in the name of the company and address the order "To the Cashier", the holder may treat the instrument as a note made by the company.

## Material Alteration of a Note

In general, the rules regarding the material alteration of a bill apply also to a promissory note. The following have been held to be material alterations sufficient to avoid a note as against a party who has not assented to the alteration: the alteration of a joint note to a joint and several note; the addition of a new maker to a joint and several note; the erasure or cutting-off of the name of a maker from a joint and several note; the alteration of the place of payment or the insertion of a place of payment where no such place was previously included; the alteration of the stamp or date, and the alteration of the number on a bank note.

On the other hand, the alteration of the words "or bearer" to "or order", or the addition of the words "on demand" on a note in which no time for payment was expressed, have been held to be immaterial alterations insufficient to avoid the instrument as against any parties thereto.

In *Leeds and County Bank, Ltd. v. Walker*, 1883, it was held that s. 64 (which empowers the holder of a note that bears a non-apparent material alteration to enforce payment of the note according to its original tenor) does not apply to Bank of England notes.

## Lost Promissory Notes

By virtue of s. 69, the maker of a lost note may be compelled to give the holder a duplicate of the same tenor, provided that the holder gives a satisfactory indemnity against the claims of any person who may come into possession of the lost note. Moreover,

s. 70 provides that, if such an indemnity is given, the loss of a note cannot be set up as a defence to an action by the holder to recover the amount of the note from the maker or other parties thereto.

This matter is of special importance in reference to lost bank notes. If the loser can give the issuing banker sufficient particulars to identify the note, he may claim a fresh note for the same amount on giving a satisfactory indemnity, as provided by s. 69.

As bank notes are payable to bearer, the finder of a bank note has a good title against all the world except the loser, and, if the finder pays such a note away for value to a person who takes it as a holder in due course, i.e., without notice that it has been lost, that holder has an absolute title to the note and even the original owner cannot reclaim it from him. Moreover, although the finder of a lost note cannot enforce payment from the issuing banker, a *bona fide* holder to whom the note has been transferred for value can insist upon payment.

Payment of a note may be "stopped" by giving full particulars thereof with instructions not to pay to the issuing banker, who will thereafter make careful inquiries as to the title of the holder if the note is presented for payment. But if the answers of the holder are satisfactory, the bank will be compelled to pay, though it may give the person registering the stop particulars of the circumstances in which the note was paid.

### Destroyed or Damaged Notes

Payment of notes that have been wholly destroyed may be claimed from the issuing bank if proof of the destruction and full particulars of the notes are given. Payment of partially destroyed notes may be claimed on returning them to the issuers. In both cases, the issuers will require a satisfactory indemnity from the claimant to protect them against any subsequent claims.

## CHAPTER 22

### OTHER BANKING INSTRUMENTS

In this chapter are briefly considered certain important instruments (other than cheques and bills) with which a banker has to deal in the course of his business.

#### Banker's Drafts on Demand

A BANKER'S DRAFT ON DEMAND is an order drawn by a branch bank on its Head Office, by the Head Office on one of its branches, or by one branch upon another, instructing the drawee to pay a specified sum to a named payee or to his order.

As the drawer and drawee of a banker's draft are the same legal person, the instrument is not a cheque or a bill of exchange within the definitions in the Act. On the other hand, by virtue of s. 5 (2) the holder of a banker's draft has the option of *treating it* either as a bill of exchange or as a promissory note.

As a banker will not risk injury to his reputation by non-payment of his own draft, payment of a banker's draft can be stopped only in exceptional circumstances, e.g., when the banker is authoritatively notified that the instrument was lost or stolen before being indorsed by the payee, in which case the person applying for payment has no title.

This general rule is, however, subject to the exception that, in some foreign countries, forged indorsements do not prevent the passing of a good title, so that an issuing banker in this country may in certain circumstances have to pay a draft even though it bears a forged indorsement.

Although banker's drafts on demand are not cheques, they may be effectively crossed by virtue of the Bills of Exchange Act (1882) Amendment Act, 1932, s. 1 of which provides that :—

1. Sections seventy six to eighty two of the Bills of Exchange Act, 1882, as amended by the Bills of Exchange (Crossed Cheques) Act, 1906, shall apply to a banker's draft as if the draft were a cheque.

For the purposes of this Section, the expression "banker's draft" means a draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank.

The crossing of a banker's draft on demand operates, therefore, exactly in the same way as it would on a cheque, and bankers paying and collecting crossed banker's drafts incur the same liabilities and enjoy the same protection as in the case of crossed cheques. A banker who pays a *crossed* banker's draft bearing a forged indorsement is protected by s. 80 of the Act, if he pays in accordance with the crossing, while a banker collecting a crossed banker's draft for a customer with no title or a defective title is not liable to the true owner if he can bring himself within the protection of s. 82.

As the Amendment Act of 1932 makes the Act of 1906 apply to banker's drafts, a banker who collects such drafts is protected by s. 82 of the 1882 Act even if he credits the drafts as cash before actually receiving payment thereof.

In regard to *uncrossed* banker's drafts on demand, the paying banker obtains no protection under the 1882 Act, for s. 60 applies only to cheques. Nevertheless, a banker who pays an uncrossed banker's draft bearing a forged indorsement is protected by s. 19 of the Stamp Act, 1853, which provides as follows :—

19. Any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn



payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof.

The collecting banker receives no protection under any Act if he collects an *uncrossed* banker's draft for a customer having no title or a defective title thereto.

The term "banker's draft" does not include drafts on demand or after sight or after date drawn *by one banker on another*, for such instruments are valid cheques or bills of exchange, and as such are subject to all the statutory provisions applicable to those instruments.

A banker's draft must not be made payable *to bearer* on demand, otherwise the issuing banker will render himself liable to a penalty under the Bank Charter Act, 1844.

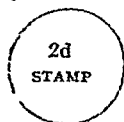
### Conditional Orders to Pay

Customers such as railway companies, government departments, friendly societies and local authorities sometimes draw on their bankers orders to pay which call for fulfilment of a condition before payment is to be made, and so do not conform to the legal requirements of a cheque that it must be an *unconditional* order. The following is a specimen of such an instrument:—

TO THE NORTHERN BANK LTD.

7th June, 19....

PAY *Thomas Robinson* OR ORDER,  
the sum of *Twenty-five pounds, ten shillings*.  
Provided the receipt below is duly signed,  
stamped, and dated.



£25 10 0

For The Northern Railway Co., Ltd.,  
*James Brown*,  
General Manager.

Received of THE NORTHERN RAILWAY CO., LTD., the sum of.....

£ : :  
\_\_\_\_\_



Date .....

As an order worded in this form imposes a duty upon the paying banker to see that the direction is obeyed before payment is made, the insertion of such a condition precedent to payment prevents the document from being a cheque within the meaning of the Act. Moreover, it is doubtful whether a conditional order can strictly be regarded as being payable on demand, because payment cannot be *demanded* until the condition has been fulfilled. A conditional order does not possess the essential characteristics of a negotiable instrument, for, even if made payable to order or to bearer, it cannot strictly be regarded as being negotiable or even transferable, since it would obviously be incongruous for a banker to pay anyone other than the payee who had given his receipt for the money.

But an order to pay is to be regarded as conditional *only if the condition is imposed on the drawee banker* and not merely on the payee. Hence, documents which are precisely similar in form to an ordinary cheque, but which bear on their face a note to the effect that an attached receipt must be signed before the instrument is *presented* for payment, or merely such words as "The receipt at back hereof must be signed, stamped, and dated", are not necessarily *conditional orders* to pay. If the direction in these cases is *addressed to the payee* and not to the drawee-banker, the documents are cheques and fully negotiable instruments.

Nevertheless, the position of the paying banker in such cases is a difficult one, for, although the direction is clearly addressed to the payee, it can be disregarded by the paying banker only at the risk that the customer might contend that his instructions had not been fully obeyed. Even if a receipt form is merely attached to or stamped on the back of a cheque, and no direction is given that the receipt is to be signed before presentment, the paying banker would run considerable risk in ignoring the receipt, for he must see that his customer's wishes are fulfilled so far as is reasonably possible.

Paying bankers ordinarily insist on a complete discharge to a conditional order before they will honour such an instrument, but they sometimes experience difficulty in obtaining a receipt stamp from the payee, particularly where the latter has already sent a receipt to the drawer. But the banker's duty is to his customer and not to the payee, so he incurs no liability by insisting on the completion of such a document in accordance with the customer's instructions. If the instrument is made payable *to order*, the indorsement of the payee may be required *in addition* to his signature to the receipt, whether that receipt appears on the back or on the face of the instrument.

Generally, a banker protects himself in respect of orders of

this nature by taking a full mandate from his customer, embodying an indemnity covering him in respect of any loss of statutory protection (see below).

Although a banker may incur liability to his customer if he fails to obtain a duly stamped receipt, he incurs no liability under the Stamp Acts for this omission. (See Chapter 23.)

Dividend warrants sometimes bear a statement to the effect that they will not be paid after the lapse of three months (or other period) from the date of issue, unless they are specially indorsed or initialled by the secretary of the issuing body. In *Thairkwall v. Great Northern Railway*, 1910, it was held that such a statement was addressed to the payee or holder and that it did not impose a condition on the drawee banker sufficient to make the document a conditional order.

### Protection of Bankers in respect of Conditional Orders

If any direction inserted in an order to pay is such as to make the order to pay conditional, the effect is to deprive both the collecting and the paying banker of the protection afforded to them by the Bills of Exchange Act, 1882, in respect of cheques.

In the case of an *open* or *uncrossed* conditional order, neither the collecting nor the paying banker obtains any protection, as against the true owner, if the payee's signature or an indorsement is forged or if the holder has no title or a defective title to the instrument. S. 60 of the Act will not protect the paying banker against a forged indorsement because it applies to cheques only, while s. 19 of the Stamp Act, 1853, affords no protection because it refers only to drafts or orders drawn on a banker *payable to order on demand*, whereas a conditional order is not transferable and cannot, therefore, be payable to order, and it is doubtful if it can strictly be regarded as payable on *demand*.

If a conditional order is *crossed*, the collecting and paying bankers are afforded protection by s. 17 of the Revenue Act, 1883, which reads as follows:—

17. Ss. 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, and s. 25 of the Forgery Act, 1861, shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the document were a cheque: Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument.

By virtue of this section, a paying banker incurs no liability to the true owner of a crossed conditional order if he pays the

amount thereof to another banker in good faith and without negligence, and strictly in accordance with the crossing. In like manner, the collecting banker is protected if, in good faith and without negligence, he collects such an order for a customer. But the collecting banker receives no protection if he credits such an order as *cash* before receipt of advice of payment, since the Bills of Exchange (Crossed Cheques) Act, 1906, applies only to cheques proper.

In view of the last clause of s. 17 that "nothing in this Act shall be deemed to render any such document a negotiable instrument", it is not clear whether paying and collecting bankers are protected in respect of a crossed conditional order which bears evidence, in the form of more than one indorsement, of having been transferred. Most authorities consider that the word "negotiable" in the clause must be read as meaning "*transferable*"; if this is the case, neither the paying nor the collecting banker is protected in respect of a conditional order that bears evidence of having been negotiated.

The general position of bankers in regard to these documents is thus highly unsatisfactory, in spite of the fact that they are frequently met with in practice, and bankers therefore exercise great care in dealing with them. Paying bankers require customers who wish to issue conditional orders to give the bank an indemnity against the claims of the true owner of any such instrument paid by the bank to a person with a defective title or no title thereto.

### Orders issued by Local Authorities

Conditional orders issued on account of local authorities introduce another complication because such orders are frequently drawn, not upon a banker, but upon a *treasurer*, who may or may not be the manager of the branch at which the account of the local authority is kept.

The banker obtains no protection of any kind against the claims of the true owner if he pays or collects such a document to or for a holder having no title or a defective title thereto. The protection of the Bills of Exchange Act is excluded because such a document is not a cheque. S. 19 of the Stamp Act, 1853, does not apply as it covers only instruments drawn *on a banker payable to order on demand*, while s. 17 of the Revenue Act, 1883, does not apply as the document is not drawn *on a banker*. The only loophole would seem to be that the paying treasurer may bring himself within the protection afforded by s. 17 of the Revenue Act in respect of *crossed* conditional orders if he can show that, as between himself and the local authority, he is to be regarded as the banker and not merely as the treasurer of the authority.

Even this does not relieve the treasurer of his personal liability to the true owner of the instrument for conversion, although he is usually given an indemnity by the authority covering any claims that may be made against him by reason of the payment of such orders to persons who have no title or a defective title.

In no circumstances should per procuration signatures be accepted on the receipts or in indorsements to instruments of the kind here referred to, unless such discharges are guaranteed by the collecting banker.

### Documents in the Form of Receipts

Documents are sometimes issued by Government Departments which have no similarity to a cheque, but are drawn up in the form of a receipt for a certain amount which it is intended shall be paid by the banker whose name is given on the instrument on presentation of the receipt duly dated, signed, and, if necessary, stamped. These instruments frequently bear an intimation that presentment must be made within a prescribed period after issue.

Probably these documents come within s. 17 of the Revenue Act, 1883, in which case both collecting and paying bankers get protection *provided the document is crossed and bears no evidence of having been transferred*. But neither the paying nor the collecting banker obtains any protection if such documents are *not crossed*.

As a rule, the paying banker is furnished with a list of the persons who are to receive payment of such instruments, and it is desirable also that he should obtain from the drawer or drawers a satisfactory indemnity against the claims of any person or persons who may seek to hold him liable in respect of a wrongful payment.

### Dividend and Interest Warrants

A DIVIDEND WARRANT is an order or authority issued by a company in payment of the dividend due to the registered holder of its stocks or shares, authorizing its bankers to pay the amount specified therein to the holder or to his named agent.

AN INTEREST WARRANT is similar in form to a dividend warrant, but differs from the latter in that it authorizes payment of a sum representing a fixed percentage of interest, for the period specified, on registered stock issued by a joint-stock company, local authority, or government.

Both dividend and interest warrants are usually made payable to a named payee *or order*, and the discharge of that payee is required in the special space provided for the purpose on the face of the instrument.

Occasionally, these warrants are made payable to a named payee or bearer. If any such warrant is in the form of a cheque, it can then be paid without the payee's discharge. But if a space is reserved on the face of such a warrant for the signature of the proprietor, the payee's discharge must be obtained, for apparently the existence of the space overrides the usual effect of making a negotiable instrument payable to a named payee or bearer.

As a rule, a *per pro.* signature on behalf of an individual payee will not be accepted either by the paying banker or by the issuers of the warrant except in special circumstances, and, even then, a form of authority must be exhibited to and approved by the issuers. Dividend warrants made payable to a limited company or corporation should be discharged by its authorized officials in the manner prescribed by their regulations.

S. 97 (3) of the Act provides that :—

97.—(3) Nothing in this Act or in any repeal effected thereby shall affect :—

(d) the validity of any usage relating to dividend warrants, or the indorsement thereof.

This provision legalises the well-established custom that permits *dividend* warrants payable to *joint payees* to be discharged by any one of the named payees, who may either sign his own name alone or sign for himself and the other or others. Such a discharge is valid and may be accepted by the paying banker or issuers of the warrant even though the joint payees are partners or trustees of the money received.

The section does not, apparently, apply to *interest* warrants, in respect of which it is usual to insist on the discharge of all payees.

Dividend warrants are frequently made out to the order of, say, "A. Jones, A/c A. Jones, S. Smith and D. Craig". Bankers must *not* place such a warrant to the credit of the personal account of the first-named payee, "A. Jones", unless they are satisfied that the matter is in order. The addition of the other names indicates that the stock is held jointly by the three persons named, and, in the event of any fraudulent application of the warrant, the banker could not contend that the direction "A/c A. Jones, etc.", was merely a note for the guidance of the payee. Even when dividend warrants so payable are in the form of crossed cheques and are negotiable, a banker runs grave risk in collecting them for the named payee's private account.

Dividend or interest warrants must bear the ordinary cheque stamp, though interest warrants issued by the Government are exempt.

To save the time, trouble and expense entailed by the issue, collection and payment of dividend and interest warrants, bank customers are encouraged to sign forms of authority instructing the paying companies, etc., to pay dividends or interest as they fall due direct to the authorizing customer's bankers for credit of the customer's account.

### Protection of Bankers re Dividend and Interest Warrants

The protection afforded to paying and collecting bankers in regard to dividend and interest warrants depends on whether they are or are not in strict cheque form. If they conform to the legal requirements of a cheque, they are covered by the protective sections of the Act, but if they do not conform to these requirements the position is not quite so clear.

S. 95 provides that :—

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

Presumably, this section applies to a *dividend* warrant whether or not it is valid as a cheque. Hence, the paying banker is protected by s. 80 if he pays a crossed dividend warrant in good faith, without negligence and in accordance with the crossing, and the collecting banker is protected by s. 82 if, in good faith and without negligence, he collects crossed dividend warrants for his customers only.

Although s. 95 does not specifically include *interest* warrants, as distinct from dividend warrants, s. 17 of the Revenue Act, 1883, extends the provisions of ss. 76-82 of the Act to crossed interest warrants, provided they are issued by a customer and drawn on a banker. Moreover, in *Slingsby v. Westminster Bank*, 1930, it was held that a warrant for the payment of interest on 5% War Loan Stock was a dividend warrant within the meaning of s. 95, though the decision was based on the statute under which the stock was issued, and is thus of limited application.

It appears that the collecting banker obtains *no* protection in respect of either dividend or interest warrants which are not strictly cheques if he credits their amount as cash to the accounts of his customers *before actually receiving payment*, for the Bills of Exchange (Crossed Cheques) Act, 1906, applies only to cheques proper, and makes no mention of dividend warrants or other documents that are not cheques.

In the case of *open* or *uncrossed* dividend warrants, the paying banker obtains the protection of s. 60 only if the document is in strict cheque form, although he may be protected by s. 19 of the Stamp Act, 1853, if there is nothing in the instrument that makes it *not* payable on demand. The collecting banker, on the

other hand, obtains no protection if he collects an open or uncrossed dividend warrant in respect of which the holder has no title or a defective title (e.g., one on which an indorsement is forged).

Difficult questions sometimes arise in connection with the negotiability of dividend warrants that are not strictly cheques. While s. 95 extends to such documents the provisions of the crossed cheques sections of the Act, it does not recognize them as negotiable instruments. Nevertheless, there is little doubt that dividend warrants can properly be regarded as negotiable by mercantile custom so long as there is nothing on the face thereof to affect their negotiability; e.g., the words "Not Negotiable" forming part of a crossing, or the fact that the instrument is made payable to a named payee *only*. But, if such a document is by its terms of payment made not transferable, then a collecting or paying banker would undoubtedly lose any protection to which he might otherwise be entitled if the instrument was paid to, or collected for, a person other than the named payee.

### Registered and Bearer Bonds

A BOND is a written obligation under seal whereby one person undertakes to pay a specified sum of money to another person on a specified day, or on the happening of a specified event. The term is frequently applied to an undertaking or promise, given under seal, whereby a company, corporation or government, promises to pay the bearer or the registered holder a specified sum of money.

*Bonds to bearer* pass by delivery, and are now generally regarded as negotiable instruments whether they are issued by a home, foreign or colonial undertaking. *Registered bonds* (e.g., Registered Exchequer Bonds) are similar to other registered securities transferable by deed of transfer; the property therein is vested in the registered holder for the time being, and the interest or dividends are payable to that holder as they fall due.

### Coupons

As a rule, interest and dividends on the capital represented by bearer bonds, share warrants and scrip certificates are paid by the issue with the bonds, etc., of sheets of *coupons*, i.e., small pieces of paper bearing the number of the relative bond and numbered (and sometimes dated) consecutively. The coupons are cut off at half-yearly or other intervals as they fall due to be presented for payment at the place indicated thereon. Usually, coupons bear on their face an indication of the place at which they are payable, but if this is omitted the place is intimated to holders by advertisement in the financial papers.



When the coupons attached to a bond are exhausted, a fresh supply may be obtained by the holder on presenting to the issuing company a slip, known as a *talon*, which is usually attached to the bond. If a *talon* is not attached, the bond itself has to be presented to obtain a new coupon sheet.

Coupons are generally exempt from stamp duty. Exceptionally, coupons attached to scrip certificates must bear a twopenny impressed stamp.

Coupons falling due on a Sunday or Bank Holiday are payable on the *succeeding* business day, for they cannot be debited to the paying customer until the date on which payment is due.

### Postal Orders and Money Orders

Postal orders and money orders are instructions issued by the Post Office for the payment of money deposited at one post office and payable at another.

POSTAL ORDERS bear spaces for the name of the payee and for his signature on receipt of the money. If the name of the office of payment is inserted in a postal order by the sender, payment will be made only at that office unless the order is presented through a bank.

MONEY ORDERS are made payable to specified persons on presentment of the order at the office of payment. Payment of a money order may be stopped by the sender, although the Postmaster-General will not hold himself responsible if payment is made by mistake or negligence after receipt by the Post Office of notice of the stop. Payment may also be deferred for any period not exceeding ten days.

Since both postal orders and money orders are expressly marked "Not Negotiable", a *bona fide* transferee for value of such an order which has been lost or stolen obtains no title to the instrument as against the rightful owner. These orders may be crossed generally or specially, in which case they will be paid only to a bank or through the bank named in the crossing. If a postal order is crossed, the Post Office does not insist on the insertion of the name and signature of the payee in the spaces provided.

The Post Office has the right to claim repayment on discovery of any irregularity concerning a paid order.

Bankers who receive postal and money orders as part of credits paid in by their customers obtain payment through the nearest post office. If, in presenting *postal orders* for payment, the banker acts simply and solely as an agent for collection, he is protected as against the claims of the true owner by s. 25 of the Post Office

Act, 1908. This provides that a banker who collects *for a principal* a postal order or document purporting to be a postal order, shall not incur liability to *anyone except that principal* by reason of having received payment of any such order or document. If a banker credits postal orders as cash *before actually receiving payment thereof*, he is liable to the true owner for conversion if the customer has no title or a defective title.

The collecting banker has no statutory protection in regard to *money orders*, and, in the case of his customer's having a defective title, is liable to the true owner for conversion. Moreover, encashment of *money orders* is provisional only, since the Post Office is permitted by its regulations to return *at any time* any order found to be irregular, and the presenting bank must thereupon refund the money. (*London and Provincial Bank v. Golding*, 1918.)

A banker should not *cash* postal orders or money orders for a customer or for a stranger, as he is not protected against loss if the orders are unpaid or if, after payment, repayment is subsequently demanded by the Post Office.

### Traders' Payments

Commercial concerns and others who have to make numerous payments at regular periods can save themselves trouble, stamp-duty on cheques, and postage by using "traders' payments" instead of cheques. The procedure is for the customer to draw a single cheque for the total amount of payments he wishes to make, and to hand this to his bankers with a list of the creditors, giving particulars of their bankers and the amount payable to each, together with a separate credit ticket for each creditor made out on forms provided by the bank. The bank sends these tickets with a list to its Head Office. At Head Office the lists received from all branches are combined and payments are made to the Head Offices of the recipient banks, who receive the credit tickets relating to their customers, so that the latter can be credited through their branches.

A small charge is made by the banks for this service, which varies according to the number and volume of the transactions, and the standing of the customer.

### Deposit Receipts

A DEPOSIT RECEIPT is a document issued by a banker, discount house or other person, acknowledging the receipt of money on deposit, and specifying that interest at a stated rate will be paid on the amount, which is declared to be withdrawable at call or on demand, or after a specified period of notice, or at the end of a *fixed period*.

The deposit receipts issued by bankers and discount houses vary considerably in form, but the form below is a typical specimen.

Not transferable.	<b>Deposit Receipt</b>	
	<b>THE LOMBARD BANK LIMITED.</b>	
		EASTLM BRANCH,
	No. 1397	11th October, 19.....
	£200 : 0 : 0	
	<p><b>Received</b> from <i>Mr. Wm. Atkins, The Cedars, Eastelm,</i>  the sum of <i>two hundred pounds</i> sterling to be accounted for  with interest at the rate of <i>2½ per cent.</i> per annum from the  date hereof subject to <i>seven days'</i> notice of withdrawal.</p>	
	Entered S.R.	For the Lombard Bank Limited, <i>Henry Jones,</i> Manager.
<p>This receipt must be produced by the depositor when the deposit  or any part thereof is withdrawn, and must be given up on repayment  of the amount, which can be paid to no one but the person in whose  favour the receipt is granted or his personal representatives.</p>		

On the back is printed :

Received the sum of.....in payment of the  
within-mentioned sum with interest to date at  $2\frac{1}{2}$  per cent. per annum.

Signature of Depositor.....

Date.....

A joint deposit receipt is payable to the survivor or survivors on the death of one or some. Otherwise, a joint receipt must not be paid to one of the parties unless the banker is given definite written instructions by all the parties to do so.

### Payment of Deposit Receipts

Deposit receipts are not negotiable or transferable, although they may be made the subject of a bequest or assignment, so that a banker is liable, even if he acts in good faith, if he pays the amount of a receipt to a person who is not entitled to receive the money, even though that person produces the receipt duly indorsed by the depositor. Probably the only defence open to the banker is that afforded by the doctrine of *estoppel*, which might preclude the depositor from denying that the person who presented the receipt was entitled to it.

In view of this, a banker who is asked to pay a deposit receipt to anyone other than the depositor should require the discharged receipt to be handed to him with an authority, signed by the

depositor, sanctioning the payment to the third party, together with proof of the identity of the person presenting the receipt.

If a request for repayment is made by another bank on behalf of the depositor, the latter's written authority should be obtained by the paying banker, or the collecting banker should be required to confirm the discharge of the holder of the receipt.

### Collecting Deposit Receipts

A banker who *collects* a deposit receipt for anyone except the true owner is liable to the latter for conversion. A collecting banker has no statutory protection in regard to deposit receipts, and he should, therefore, refuse to present such an instrument for payment unless he has every reason to be satisfied with the title of the presenter. This point is of importance because persons sometimes open accounts by paying in for collection a deposit receipt issued by another bank.

### Deposit Receipts may be Assigned in Writing

Although a deposit receipt is not a negotiable instrument and is not transferable, it is a chose in action and can be *legally* assigned. To be valid, the assignment must be *absolute* and not by way of charge; it must be in writing, signed by the depositor, and written notice thereof must be given to the banker who issued the receipt.

A banker who receives notice that a deposit receipt has been assigned must pay the amount to the assignee and to no other, and the signature of the assignee is a good discharge.

In the case of *In re Mead*, 1880, it was held that a cheque form on the back of a deposit receipt filled in for *part* only of the amount of the deposit was valid as an order on the banker to pay the sum mentioned to the person indicated. But the banker is not bound to honour cheques drawn against deposit receipts unless he has expressly or impliedly undertaken to do so.

### Loss of Deposit Receipt

Where a deposit receipt is lost or mislaid, and the depositor requires the money, it is the practice of bankers to obtain an indemnity against the recovery and presentment for payment of the lost document. Strictly, the banker is not entitled to demand this, inasmuch as the receipt is not a negotiable instrument, and he may therefore be compelled to pay the depositor without being given an indemnity.

## LETTERS OF CREDIT

LETTERS OF CREDIT issued by the banks take many forms and fulfil a variety of functions. In general, a letter of credit is a document which enables the credit of the grantee (*i.e.*, the person in

whose favour it is issued) to be reinforced or substituted by the superior credit of the issuer, usually a banker, with the object of enabling the grantee to obtain funds in a strange place on the strength of the reinforced credit.

Letters of credit may be further classified as : (a) *commercial or trade credits*, which are intended to facilitate the movement of goods ; and (b) *non-commercial credits*, which are intended to facilitate the movement of persons, i.e., to enable travellers to obtain such funds as they require on the strength of an instrument or authority issued under the signature of the bank granting the credit.

### NON-COMMERCIAL CREDITS

#### Travellers' Letters of Credit

A TRAVELLER'S LETTER OF CREDIT is an irrevocable bank credit containing a request addressed by the issuing bank to its correspondents and agents to cash on demand any drafts or cheques drawn by the holder of the credit on the issuing bank up to a stated amount.

These credits are issued only to persons who are well known to the bank, or who are satisfactorily introduced, and only against payment of the full amount involved, or against the deposit of a guarantee or other security.

The general object of a traveller's letter of credit is to save the grantee the trouble of carrying large sums of money with him from place to place. There are various types, e.g., circular letters of credit ; world-wide letters of credit ; and limited letters of credit.

CIRCULAR OR WORLD-WIDE LETTERS OF CREDIT. These are available with *any* of the issuing bank's agents or branches whose names are given on a list handed to the customer in a "Letter of Indication", which introduces the holder to the issuing bank's agents. The letter of introduction bears the signature of the holder, signed in the presence of the issuing banker, as a means of identification, and, for safety's sake, should always be carried by the holder separately from the letter of credit.

LIMITED LETTERS OF CREDIT. These are addressed to, and are only available with, certain agents and correspondents specified in the letter of credit, which itself contains the specimen signature of the holder. No letter of indication is issued in this case, because each one of the specified agents with whom the credit is available is advised of its issue and is furnished with a specimen signature of the holder for comparison with that given in the letter of credit. The ordinary form of *Encashment Credit*, frequently issued in this country (e.g., to persons going on holiday), is of this type.

## Circular Notes

A CIRCULAR NOTE is a modified traveller's letter of credit. It takes the form of a letter of introduction to agents and correspondents of the issuing bank combined with a blank form of sight draft on the issuing bank for a fixed denomination in the currency of the issuing bank's country. Circular notes are handed to the customer against payment of their full face value, and, when completed by the holder, can usually be cashed at the cashing bank's buying rate for sight drafts on the issuing centre on the date of encashment.

### CIRCULAR NOTE

#### THE LOMBARD BANK LIMITED

No. 1793

London, E.C.  
17th June, 19.....

#### CIRCULAR NOTE FOR TEN POUNDS STERLING.

GENTLEMEN,

This Circular Note should be presented to you by *Mr. James Brown*, whose signature appears on our Letter of Indication No. 108, with which *he* has been furnished. Please pay *him* or *his* order the value of Ten pounds sterling at the current rate of exchange.

£10 : 0 : 0

We are, Gentlemen,

Your obedient Servants,

To the Branches and Correspondents The Lombard Bank Limited,  
of the Bank.

*Henry Robinson,*  
General Manager.

[On the Back is printed :]

#### TO THE LOMBARD BANK LIMITED

£10 : 0 : 0

London, E.C.

At sight pay to the order of.....ten pounds  
sterling for value received at the rate of.....

(Holder's Signature).....

(Date).....

## Travellers' Cheques

TRAVELLERS' CHEQUES are documents, similar to a cheque, which require payment by the issuing bank of certain round sums, in this country usually £5 or £10. They are issued by the banks only to known customers, in exchange for cash. The customer is required to sign each cheque, when it is handed to him, in the presence of an official of the issuing bank, and he can thereafter cash the cheque at any agency of the issuing bank or elsewhere.

As a rule, the current value of travellers' cheques in various important foreign currencies is indicated on the face, and they are sometimes, though not always, accompanied by a Letter of Indication, giving a list of agents and correspondents of the issuing bank. On encashment, the holder is required to sign the instrument in the presence of the payer, who compares the signature with that already on the cheque. As a further safeguard, the holder may be asked to produce his passport

<b>TRAVELLER'S CHEQUE</b>	
<b>PAYABLE IN ALL COUNTRIES OF THE WORLD</b>	
No. 7196	<i>Payable within Twelve months from (Date) 20th June 19</i>
<i>Drawer's Endorsement.....</i> <i>(To be signed in the presence of the Paying Agent)</i>	
<b>To THE LOMBARD BANK, LIMITED</b> <b>LONDON, E.C. 2</b>	
Pay Self or Order	Signature of Drawer } John Davis,
Ten Pounds	{ Witness to Signature of Drawer } Hy. Brown, Manager
<b>£10</b> OR THE EQUIVALENT ABROAD AT CURRENT RATES OF EXCHANGE.	Westfield Branch.

### Circular Cheques

CIRCULAR CHEQUES (to be clearly distinguished from Circular Notes) are issued by banks in certain countries to their agents or correspondents abroad so that the latter may fill them in (*i.e.*, draw them) and sell them to customers who are about to visit the country of the issuing bank. The cheques are similar in form to ordinary bank cheques and are bound in books of 10, 20, etc., in the same way. They bear the name of the issuing bank and are printed in different colours according to the maximum amount for which they can be drawn. For example, cheques printed in red must not be used for amounts in excess of 1,000 francs, and so on.

### COMMERCIAL CREDITS

COMMERCIAL LETTERS OF CREDIT are designed to assist traders rather than travellers. They enable a buyer of goods to reinforce his own credit by that of a well-known bank, and so satisfy the

seller that the goods will be paid for. In some cases, also, commercial credits are used by exporters to enable them to finance their shipments of goods by bank bills instead of by trade bills.

Commercial letters of credit are variously described according to their terms and the facilities they place at the disposal of a customer.

### Acceptance Credits

ACCEPTANCE CREDITS, frequently issued by London bankers and accepting houses, authorize the grantees to draw bills on the issuers within prescribed limits, the issuers undertaking to accept and pay the bills provided they are in proper form and conform with the conditions of the credit.

Such credits may be issued by London bankers in favour of foreign exporters at the request of importers, either here or abroad, the arrangement enabling the foreign exporter easily to negotiate bills drawn on a London house of established reputation, and giving the importer the benefit of that reputation in making his purchases.

Many acceptance credits are opened by London banks for exporters *in this country* to finance outward shipments of goods. The exporters, instead of drawing their bills on importers abroad, draw by arrangement on well-known London banks or accepting houses as soon as the goods are shipped. The bank usually confirms to the exporter that it will accept bills representing about 75 per cent. of the invoice value of the goods exported, provided the bills are accompanied by certain specified documents, valid and in order. After examination and verification of the documents (which are retained by the bank to be passed to the importer on payment for the goods), the bill is accepted and returned to the exporter, who is thereby enabled to have it discounted immediately and the proceeds placed to his credit.

This method is of value where the foreign buyer is unable or unwilling to open a suitable credit, or when discount rates applicable to foreign bills are high.

### Confirmed Bank Credits

A CONFIRMED BANK CREDIT means a credit that embodies an undertaking by the issuing bank to honour all drafts drawn under the credit so long as they conform with its terms. The inclusion of such an undertaking or promise means that the credit is *irrevocable* so far as the issuing banker is concerned, and that the beneficiary can safely rely on due honour of his bills and can negotiate them without difficulty.

Some people consider that a confirmed credit is one that involves, not only the undertaking of the issuing banker, but also that of the negotiating banker, *i.e.*, the banker who advises the



credit to the beneficiary and who usually negotiates the bills drawn thereunder; in other words, they regard a confirmed credit as one in which the negotiating banker adds his own undertaking to that of the issuing banker, and so, in fact, gives the beneficiary a double guarantee that his bills will be met. Usually nowadays the wording of the credit should make this clear.

### Unconfirmed Credits

AN UNCONFIRMED (OR REVOCABLE) CREDIT involves no *undertaking* on the part of the banker opening the credit to accept bills drawn thereunder. Such a credit is in fact nothing more than an intimation to the addressee that, at the time of writing, the issuing banker is prepared to honour bills drawn under the credit provided that all conditions as to form, amount and term are complied with. The customer opening the credit may cancel it at any time, and, if this is done, the issuing banker is under no obligation to advise the addressee abroad. Such credits are thus unsatisfactory, for the issuing banker is not bound to honour drafts drawn thereunder before receipt by the addressee of notice of cancellation, unless he has specifically agreed to do this.

A revocable credit may be withdrawn by the issuing banker at any time after its issue, whereas an irrevocable credit cannot be withdrawn once its terms are communicated to the beneficiary.

### Omnibus, Fixed and Revolving Credits

AN OMNIBUS CREDIT is one granted to shippers of undoubted standing to enable them to draw *round amounts* on a bank against the security of a *general lien* over their goods, the object being to enable the shippers to obtain funds for further operations and prompt payment for their produce as soon as it is placed on board ship.

FIXED CREDITS are ordinary credits available for a fixed total amount, in either one draft or several. As a rule, their availability is limited to a stated period.

REVOLVING CREDITS are those which are automatically renewed from time to time as certain conditions are fulfilled. There are four principal types: (a) for a fixed amount *in one draft at any one time*, the credit being immediately re-available; (b) for a fixed amount in one draft at any one time, the credit being re-available for the next draft *only when advice has been received of payment of the previous one drawn*; (c) for an *unlimited amount in all*, but with a limit to drafts current at one time, so that the credit is re-available only when advice has been received that previous drafts have been paid, bringing the total amount of drafts current at any one time below the agreed limit; (d) for a *limited amount in all*

during a specified period, e.g., up to a limit of £10,000 during any one month, the credit being re-available during each period for the limited amount.

### Documentary Credits

A DOCUMENTARY CREDIT is any credit (confirmed, unconfirmed, fixed, revolving, etc.) which provides that bills drawn thereunder will not be negotiated and honoured unless they are accompanied by the documents relating to the shipment of goods in respect of which the bills are drawn.

The documents thus required are usually the bills of lading, marine insurance policy and invoice, although other documents may be required by the credit. The documents convey the title to the goods to the banker, and provide him with security in case the customer at whose request the credit is opened does not put him in funds to meet the bills drawn under the credit when they are presented for payment at maturity. Frequently, the pledge of documents of title to goods as cover for the due payment of documentary bills is evidenced in a Letter of Hypothecation. (See page 64.)

### Clean Credits

CLEAN CREDITS are those available in drafts unaccompanied by shipping or other documents of value, funds thereunder being obtained by the beneficiary merely by presenting his bills with the credit to the agents or correspondents of the issuing bank.

Clean credits are frequently opened, not to finance the movement of goods, but purely for finance purposes connected with the transfer and loaning of funds by bankers in one centre to those in another. When clean credits are opened to finance shipments of goods, the bills of lading are usually sent direct to the consignee, instead of being handed to the bank with the relative drafts for negotiation.

A banker has to exercise great care in opening clean credits for anyone other than a bank or financial house of known repute, for there is no collateral security in the form of shipping documents, and there is always the possibility that the credits are being utilized by persons for other than legitimate trade purposes. Unless, therefore, the parties are of the highest standing, the issuing banker will usually insist on the deposit of security in the form either of a guarantee or of a cash deposit covering the whole amount involved.

## CHAPTER 23

## STAMP DUTIES ON BANK INSTRUMENTS

THE Bills of Exchange Act, 1882, makes no reference to the fact that all bills and promissory notes not exempt from stamp duty must be properly stamped in accordance with the requirements of the Stamp Act, 1891, and amending Acts.

If an instrument executed in the United Kingdom or relating to property situate in the United Kingdom requires to be stamped, it cannot be received as evidence in a British Court except in criminal proceedings unless it is properly stamped. But if the document is one that may be legally stamped *after execution*, it may be received in evidence on payment of (a) the unpaid duty; (b) the prescribed penalty for omission to stamp; and (c) a fee of £1.

The Stamp Act, 1891, provides that, except where express provision is made to the contrary, the stamp duty on all documents shall be denoted by *impressed* stamps only. The stamp must be affixed in such a way that it cannot be used for any other purpose, while, if more than one instrument appears on the same piece of material, each instrument must be stamped as if it were a separate document.

**Appropriated Stamps**

Appropriated stamps are those which by words on the face are intended to be used only for a particular description of instrument, *e.g.*, the foreign bill stamp, which bears on its face the words "Foreign bill or note", and the *impressed* "Bill or note" stamp, which is specifically appropriated to the payment of *ad valorem* duty on inland bills and promissory notes payable at more than three days after date or sight.

Appropriated stamps cannot be used on any instruments other than those for which they are specifically intended, whilst the instruments for which they are intended are deemed to be duly stamped only if the proper appropriated stamps are used thereon.

Though postage stamps are appropriated, it is provided by the Stamp Act that such stamps can be used for any stamp duties not exceeding two shillings and sixpence for which adhesive stamps may be used and for which there are no appropriated stamps.

**Duty to Cancel Adhesive Stamps.**

S. 8 of the Stamp Act, 1891, provides that :—

8.—(1) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp cancels the same by writing on or

across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(3) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, *shall incur a fine of ten pounds.*

Adhesive stamps may be cancelled by any method that renders them incapable of being applied for any other purpose, *e.g.*, by impressing a rubber date-stamp on the face, or by cancelling the stamps in ink or copying pencil. Cancellation with an ordinary lead pencil is not sufficient.

## STAMPING BILLS AND PROMISSORY NOTES

For purposes of stamp duty, the following definitions of a bill of exchange and of a promissory note, as given in ss. 32 and 33 of the Stamp Act, 1891, are much wider than those given in the Bills of Exchange Act, 1882, and bring within their scope many instruments that would not be covered by the latter Act:—

32. For the purposes of this Act the expression "bill of exchange" includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression "bill of exchange payable on demand" includes—

(a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and

(b) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.

33.—(1) For the purposes of this Act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money.

(2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

## Scale of Duties on Bills and Promissory Notes

The scale of duties payable in respect of bills of exchange and promissory notes as defined by the above sections is set forth in the First Schedule of the Stamp Act, 1891, as amended by the Finance Act, 1899, and the Finance Act, 1918. By the combined operation of the three Acts, the duties are as follows :—

BILL OF EXCHANGE payable on demand or at sight or on presentation, or not exceeding three days after date or sight,	£	s.	d.
for any amount	0	0	2

This duty is "*fixed*", i.e., it does not vary whatever the amount of the instrument, and may be denoted, whether the bill is drawn in this country or abroad, by an impressed stamp or by a postage stamp or postage stamps to the value of 2d.

BILL OF EXCHANGE OF ANY OTHER KIND whatsoever (except a bank note) and PROMISSORY NOTE of any kind whatsoever (except a bank note), drawn or expressed to be payable in the United Kingdom :—

Where the amount or value of the money for which the bill or note is drawn or made does not exceed £10	£	s.	d.
Exceeds £10 and does not exceed £25	0	0	2
" £25 " £50	0	0	3
" £50 " £75	0	0	6
" £75 " £100	0	0	9
" £100, then for every £100, and also for any fractional part of such amount or value	0	1	0

All the duties in this table, including the twopenny duty on bills under £10, must be denoted by the specially appropriated *ad valorem* stamps.

On bills and notes drawn or made within the United Kingdom the proper "bill or note" stamps must be *impressed* before issue, while, on bills drawn abroad, the appropriated *adhesive* "foreign bill or note" stamp must be affixed in accordance with the provisions detailed below.

The 2d. stamp on a cheque or bill on demand, or not exceeding three days after date or sight, for any amount, is to be distinguished from the "bill or note" stamp on a bill payable more than three days after date or sight for £10 or less. The former duty is "*fixed*" and the stamp *may* be either impressed or adhesive. The latter duty is *ad valorem* and the stamp, which is appropriated, *must* be impressed on an inland bill and adhesive on a foreign bill.

A promissory note of *any kind whatsoever*, i.e., whether payable on demand or not, requires an *ad valorem* stamp.

## Bills drawn and payable out of the United Kingdom

Bills of exchange *both drawn and expressed to be payable out of the United Kingdom*, and paid or in any manner negotiated in the

United Kingdom, are subject to reduced duties. Where the amount of such a bill does not exceed £25, the duty is as in the above schedule, but :—

(a) Where the amount exceeds £25 and does not exceed £100, the duty is 6d. ;

(b) Where the amount exceeds £100, the duty is 6d. for every £100, and also for any fractional part of £100.

Hence, a bill for £75 drawn in Paris payable in Berlin but negotiated in this country requires a 6d. *adhesive foreign bill stamp* by reason of its being *both drawn and payable* out of the United Kingdom. But a bill for £75 drawn in London payable in Paris requires a 9d. *impressed stamp*, while a bill drawn in Paris payable in London requires a 9d. *adhesive foreign bill stamp*.

### Bills and Notes drawn in the United Kingdom

An inland cheque is properly stamped if it is drawn on an impressed stamp form or on an ordinary piece of paper to which postage stamps to the value of 2d. are affixed. An inland bill of exchange for £1,000 payable on demand or at not more than three days after date or sight may be stamped with an impressed or adhesive 2d. stamp ; but an inland bill of exchange for £10 or less payable more than three days after date or sight must be drawn on paper bearing a 2d. *impressed bill or note stamp*.

With one exception, provided for as follows in s. 37 of the Stamp Act, no bill of exchange or promissory note subject to an impressed stamp can be stamped after execution :—

37.—(1) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

(2) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

### Orders for Payment other than Cheques and Bills

An order of a customer instructing his banker to make a payment at a certain fixed future date does not require stamping as a bill of exchange after date ; a 2d. impressed or adhesive stamp is sufficient, for, by s. 32 of the Stamp Act, quoted above, the expression " bill on demand " includes an order for the payment of a sum of money at any time after the date thereof, provided the order is sent to the person *by whom* the payment is to be made and not to the person *to whom* the payment is to be made or to any person on his behalf.

By the same section, a bill of exchange payable on demand includes an order instructing a person to pay a sum of money weekly, monthly or at any other stated periods, and thus applies to a "standing order" by which a customer instructs a banker to pay subscriptions, insurance premiums or other periodical payments on his behalf. Such an order, therefore, requires a 2d. stamp.

Where payments are made by a banker under the "Traders' Payments" system (see p. 258), and the customer gives the banker a cheque to cover all the payments, no stamp is required on the list of payments given by the customer or on the "credit tickets" that are passed through. The only duty payable is the 2d. stamp on the customer's cheque. If the customer gives no cheque, the list of payments needs a 2d. stamp.

Provided it is not in actual cheque form, an instruction given by a customer to his bank instructing the latter to transfer money from one of his accounts to another in his name does not require stamping, since the instruction does not constitute an order to pay another person or a document entitling another person to payment. This is so even though one account is held by the customer beneficially and the other in a fiduciary capacity (e.g., a solicitor's "Client Account").

### Stamping Bills and Notes Drawn Abroad

The definitions of inland and foreign bills given in the Bills of Exchange Act, 1882, do not apply for stamp duty purposes, but, for determining the type of stamp it should bear, a bill or note is regarded as "foreign" if it purports to be drawn or made outside the *United Kingdom* (Stamp Act, 1891, s. 36).

The *United Kingdom* includes England, Wales, Scotland and Northern Ireland, but not the Irish Free State, or the Isle of Man, or the Channel Islands (Jersey, Guernsey, Alderney and Sark), though the Channel Islands and the Isle of Man are within the term *British Islands* used in the Bills of Exchange Act definition of an inland bill (see p. 81). Hence, bills drawn in the Channel Islands and in the Isle of Man are foreign bills for stamp duty purposes, but inland bills for the purposes of the Bills of Exchange Act if drawn on persons resident in the *United Kingdom*, or if payable in the *United Kingdom*.

The position in regard to the Irish Free State is not clear, because no alteration has been made in the stamp laws to cover the Free State's assumption of independent status. Apparently the Irish Free State is *not* regarded as a foreign country for purposes of stamp duty, though it is so regarded for purposes of the Bills of Exchange Act.

A circular issued by the Commissioners of Inland Revenue in May, 1923, stated that :

" An instrument chargeable with stamp duties in both countries and stamped in either country will, to the extent of the duty it bears, be deemed to be stamped in the other country. So long, therefore, as the same rates of stamp duties obtain in Great Britain and the Irish Free State, such an instrument, duly stamped in the one country, will not require to be stamped in the other ".

The bill must, in any case, be stamped in the country of origin. Thus, a bill drawn in London on a person resident in Dublin and payable in Dublin is not properly stamped with an Irish impressed stamp : an impressed British stamp is required.

All foreign bills and notes liable to the *ad valorem* duty must be stamped with *adhesive* foreign bill stamps ; but those liable to the *fixed* 2d. duty (*i.e.*, foreign bills of exchange, but *not* promissory notes, payable on demand, at sight, or at not exceeding three days after date or sight) may be stamped with impressed stamps or adhesive postage stamps, or adhesive foreign bill stamps.

Thus, a foreign drawn bill for £1,000 payable on demand may be stamped with an impressed stamp or a 2d. postage stamp or a 2d. foreign bill stamp, but a foreign drawn bill for £10 payable 30 days after date or sight must be stamped with an adhesive foreign bill stamp. The duty in the latter case, being *ad valorem* and not fixed, must be denoted by the stamp specially appropriated to the class of document, *i.e.*, the adhesive foreign bill stamp.

*Promissory notes* drawn abroad must bear *adhesive* foreign bill or note stamps, whether they are payable on demand or not.

The fact that a bill or note is adequately stamped according to the law of the country of issue does not affect its liability to stamp duty under British Law, while our Courts are not concerned with the fact that a foreign bill is not properly stamped in accordance with the law of the country of issue.

### Holder's Duty to Stamp a Foreign Drawn Bill

By s. 35 of the Stamp Act, 1891, every person, into whose hands any bill of exchange or promissory note, drawn or made in the United Kingdom, comes in the United Kingdom before it is stamped, is required, before he presents the bill or note for payment, or before he indorses, or transfers, or in any manner stamps it, or before he pays it, to affix thereto a proper adhesive stamp of sufficient amount, and to cause the same to be so affixed.

But if, when any such bill or note comes into the hands of a *bona fide* holder (a) there is affixed thereto an adhesive stamp which is effectually cancelled, the stamp shall, so far as relates to the bill or note, be deemed to be duly cancelled although it may not appear to be so.



been affixed or cancelled by the proper person ; or (b) there is affixed thereto an adhesive stamp not duly cancelled, the holder may cancel the stamp as if he were the person by whom it was affixed, and on his so doing the bill or note shall be deemed to be duly stamped and be valid and available as if the stamp had been cancelled by the person by whom it was affixed.

Neither of these provisos will, however, relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.

Since this section applies only when a bill is presented for payment, indorsed, transferred, negotiated or paid, a foreign drawn bill may be *presented for acceptance* in this country without becoming liable to British stamp duty. But such a bill will require stamping with the relative foreign bill stamp if the drawee pays it at once instead of accepting. Moreover, if a foreign bill is both drawn and payable abroad, and, without being negotiated in this country, is indorsed by the payee or a holder and is sent here to be held during its currency as security for a loan, then it must be stamped in accordance with British law (at the reduced rate).

### Penalty for Issuing Unstamped Bills and Notes

38.—(1) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2) Provided that if any bill of exchange payable on demand or at sight or on presentation [or at a period not exceeding three days after date or sight—*Revenue Act, 1909*] is presented for payment unstamped. The person to whom it is presented may affix thereto an adhesive stamp of twopence, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available.

(3) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill.

Th s. 38 (2), if an inland cheque or bill of exchange on demand, By sight, or at not exceeding three days after date or sight, at is ed unstamped, the person to whom it is presented for payment issu then banker) is the only person authorized to affix and cancel s. . adhesive stamp, if such a stamp has not been previously affixed. adh if such an instrument is so stamped by the drawee, such ny, ing does not relieve any defaulting party of the penalty of m, a o which he is subject by reason of having omitted to stamp t instrument.

In the case of unstamped *foreign drawn bills* on demand, etc., the stamp may be affixed not only by the drawee, in accordance with this section, but also by any holder in this country as provided by s. 35. In this respect the rights of a *bona fide* holder of a foreign bill differ from those of a *bona fide* holder of an inland bill, for, as has been pointed out, an inland bill cannot be stamped after execution unless it falls within the exceptions specified in ss. 37 and 38.

### Documents Exempt from Duty as Bills or Promissory Notes

(1) Bill or note issued by the Bank of England or the Bank of Ireland.

(2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

The latter exemption refers to the documents known as "Bankers' Payments", issued for the purpose of settling clearing differences, or making special payments between bankers who do not conduct agency accounts with each other. *Both* drawer and drawee must be bankers in the United Kingdom. Since the Irish Free State is not now part of the United Kingdom, a banker's payment by a bank in the United Kingdom to a bank in the Free State or *vice versa*, is not exempt, but should be stamped as a cheque.

(3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.

This covers letters (including mail transfers) addressed by one bank to another directing a payment or transfer of money to the account of, a third person, or a direction sent by one bank to another directing the latter to transfer money to the account of the former at a third bank. In the latter case, the letter of instruction must pass between the two bankers first mentioned.

(4) Letter of credit granted in the United Kingdom, authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

By exemption 5, all cheques issued by Government Departments are exempt, but cheques issued by local authorities must be stamped.

(6) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue.

This exemption applies only to the remittance of money which is already public money; it does *not* extend to cheques drawn by taxpayers in payment of customs or excise duties, income tax, etc. Such cheques must be stamped.

By the Post Office Act, 1890, cheques of postmasters are exempt from stamp duty if executed for the purpose of making payments from one department of the Post Office to another.

(7) Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security.

This exemption does not apply to a coupon attached to a scrip certificate. The Finance Act, 1894, exempts from stamp duty a coupon for interest on a marketable security, being one of a set of coupons whether issued with the security or subsequently.

The Friendly Societies Act, 1896, exempts from duty cheques issued by a friendly society or an Approved Society under the National Insurance Acts (provided in each case that the Society is *registered* under the Friendly Societies Acts).

Cheques drawn by registered building societies are exempt provided: (1) that the bankers are, by the Rules of the society, constituted officers of the society; (2) that the Rules direct that payments are to be made by cheque, and (3) that the cheques are payable to members of the society.

Cheques of unincorporated building societies and other societies must be stamped.

Cheques issued by a trustee in bankruptcy are exempt. So also are cheques issued by a liquidator on the liquidation account in a *compulsory* winding up or in a *creditor's* voluntary winding-up. Cheques drawn by a liquidator in a *members'* voluntary winding-up are not exempt.

Cheques drawn by a receiver of a registered company in a compulsory or in a creditors' winding-up are exempt if drawn within the scope of his authority, *e.g.*, drawn on the receiver's trading account in connection with the authorized carrying-on of the business of the company.

### Bills Payable with Interest

The stamp duty on a bill or promissory note payable with interest is chargeable only on the principal sum for which the bill is drawn *unless* the actual amount of interest is clearly indicated on the face of the instrument, in which case the stamp must cover the interest as well as the principal sum. Hence, a bill for £1,200 with interest at 5 per cent. per annum requires a stamp for 12s. only, whereas an instrument drawn for payment of "£1,200 with the addition of £60 as interest", requires a 13s. stamp.

## Bills Drawn in Foreign Currency

S. 6 of the Stamp Act, 1891, provides that the *ad valorem* stamp duty on bills of exchange and promissory notes drawn in a foreign currency shall be calculated on the value of the money in British currency according to the current rate of exchange on *the date of the instrument*.

If an exchange is a fluctuating one, it is sometimes difficult to determine, on the day when stamping becomes necessary, what was the rate on the date of the bill. Nevertheless, the Inland Revenue will not countenance the practice of taking for stamping purposes the rate of exchange on the date of maturity, although the rate of exchange at the date of maturity must be taken for purposes of *payment* (see p. 78).

## Bills Drawn in a Set

39. When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

The law will recognize an unstamped part of a bill in a set as evidence *only if it has not been issued or in any manner negotiated* apart from the other parts; and, if such a part has been so issued, negotiated or transferred as a separate instrument, it must be properly stamped, otherwise any parties to the issue, negotiation or transfer are liable to the usual penalties.

A *part of a set* to which the section relates must be distinguished from a *copy* of a bill. A copy of a bill is recognized in this country for two purposes only: (1) as evidence of indorsement and of the liability of an indorser on a bill issued and negotiated in a foreign country where copies are legal; and (2) for purposes of protest when the original bill is lost. In this connection, the practice of seeking to give effect to an unstamped inland bill of exchange by attaching thereto a copy drawn subsequently on properly stamped paper is invalid and, therefore, ineffective. It is tantamount to stamping a bill with an impressed stamp after execution, and anyone issuing, negotiating or paying such an instrument is liable to a penalty, while no transferee or holder can sue upon it.

Difficulties sometimes arise when an unstamped blank acceptance is sent from abroad for signature by the drawer. If it is possible (*i.e.*, if the form of the bill permits), the blank acceptance should be attached to a duly stamped second part and the two parts should be negotiated together as a bill in a set. If this

cannot be done, the instrument can be stamped with the correct impressed stamp as an inland bill provided that, before the drawer signs it, it is presented to a Stamping Office within seven days of its receipt in this country with a written statement that no use has been made of it since its arrival.

### Stamping Bills and Notes after Execution

There are only *three* cases in which a *bill of exchange or cheque* can be legally stamped after execution and two cases in which a promissory note can be so stamped:—

1. *Inland bills of exchange* subject to the *fixed* 2d. stamp duty, *i.e.*, those payable on demand, or payable at not more than three days after date or sight, may be stamped after execution by the person to whom they are presented for payment, but by no other. Moreover, this power cannot be exercised by such person unless he is prepared to pay the instrument.

2. *Bills of exchange or promissory notes*, drawn or made out of the United Kingdom and therefore requiring to be stamped with adhesive stamps, may be stamped by any holder into whose hands they come in this country.

3. *Bills of exchange or promissory notes*, sufficiently stamped as to amount, but written on paper meant for a different sort of instrument, such as an insurance policy form or a protest form, which bears a stamp of improper denomination, may be stamped with the requisite stamp in accordance with the provisions of s. 37 of the Stamp Act (*ante*).

Although a post-dated cheque is in effect a bill payable at a future date, it is not invalid as a cheque under the Bills of Exchange Act, and is therefore correctly stamped with a 2d. impressed or adhesive stamp.

### STAMPS ON RECEIPTS

S. 101 of the Stamp Act gives a very wide definition of a receipt:—

101.—(1) For the purposes of this Act the expression “receipt” includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

The receipt duty of twopence may be denoted by either impressed or adhesive stamps. The adhesive stamps used are postage stamps, which must be properly cancelled by the person giving the receipt before he delivers it out of his hands. A receipt may not be stamped after it has once been given, except under the conditions set forth in s. 102 of the Stamp Act, as follows:—

**102.** A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

- (1) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;
  - (2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;
- and shall not in any other case be stamped with an impressed stamp.

A *duplicate receipt* requires stamping in the same way as the original if the amount is £2 or over.

### Receipts Exempt from Stamp Duty

The First Schedule of the Stamp Act, 1891, as amended or extended by the Acts referred to below, provides that the following documents *inter alia* shall be exempt from stamp duty:—

- (1) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.

By this provision, a deposit receipt issued by a banker to a customer is exempt from stamp duty, but the receipt indorsed on the back of the instrument must be stamped by the customer on withdrawal if the amount is £2 or over. But no receipt stamp is required if the amount of the deposit is being transferred to a current account or to another deposit account or deposit receipt.

The exemption also extends to a letter sent by a banker to his customer acknowledging the receipt of money including cheques, bills, etc.) for the credit of the customer's account. But an acknowledgment or receipt sent by a banker to a *third party*, in respect of money paid in by that party to a customer's account, is not exempt from duty, as it is not sent to the person to whom the banker is accountable for the money.

A receipt given by one bank for money received by it for transfer to another bank is not exempt, for the bank receiving the money has not to account for it to the person for whose account it is received. The duty in such a case may, however, be avoided if the bank receiving the money acknowledges it as agent for the other bank, e.g., by stating on the receipt "Received by the Northern Bank, Limited (by its agent the Southern Bank, Ltd.), the sum of . . .", etc.

- (2) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.

This exemption covers the receipt by a banker of any cheques, bills of exchange, promissory notes, dividend warrants and conditional orders for payment which fall within the definitions of these documents for stamp duty purposes.

By s. 9 of the Finance Act, 1895, a receipt written on a bill of exchange or promissory note must be duly stamped, whether it appears on the face or back of the instrument. But the name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business as a banker on a duly stamped bill of exchange or promissory note, or the name of a payee (*without words of receipt*) written on a draft or order, does not constitute a receipt chargeable with stamp duty.

This exemption covers the case where a banker indorses a cheque or bill of exchange with the words "Received for the credit of payee's account with us" or "Placed to the credit of payee's account with us", and also the stamping of a banker's name on the back of a bill of exchange forwarded for collection, although such a stamp is obviously evidence that a banker receives, or wishes to receive, the proceeds.

S. 33 of the Friendly Societies Act, 1896, exempts from stamp duty a receipt given by a registered friendly society for any money received by it according to its rules, or for its purposes.

S. 36 of the Finance Act, 1924, exempts from stamp duty receipts given for or on account of any salary, pay or wages, or for or on account of any other like payment made to or for the account or benefit of any person, being the holder of an office or an employee, in respect of his office or employment, or for or on account of money paid in respect of any pension, superannuation allowance, compassionate allowance or other like allowances.

A receipt executed abroad and afterwards sent to a person residing in this country is subject to British stamp duty if it relates to any property situated, or to any transaction effected, in the United Kingdom, otherwise it is exempt. Receipts on cheques drawn in favour of payees residing abroad may be exempt from stamp duty, but, as it is usually impossible for the paying banker to determine whether or not stamp duty is payable in such cases, his best plan is to insist on a stamp.

Although the paying bank would not incur any penalty under the Stamp Acts for failing to obtain a stamped receipt in such cases, the customer might claim that his instructions had been disobeyed and might refuse to reimburse the bank. In view of this possibility, a banker should endeavour to dissuade his customers from issuing cheques with receipts attached to payees abroad, or he should insert in his indemnity form a clause authorizing him to pay cheques negotiated abroad without insisting on a stamped receipt.

A banker who is asked to *collect* a cheque bearing a receipt signed

abroad incurs no penalties for presenting the cheque with the receipt unstamped, but, if payment is refused on this ground, the banker should have an impressed stamp affixed within 30 days of the arrival of the cheque in this country.

### OTHER STAMP DUTIES OF IMPORTANCE TO THE BANKER

AN AGREEMENT UNDER HAND requires a 6d. adhesive stamp. There are certain exceptions.

ARTICLES OF ASSOCIATION of a joint-stock company require a 10s. deed stamp, which must be impressed, and on registration must be accompanied by a 5s. fee stamp.

ARTICLES OF PARTNERSHIP require a 6d. adhesive or impressed stamp if under hand, or a 10s. deed stamp if under seal.

A BILL OF LADING or order for any goods to be exported or carried coastwise requires a 6d. impressed stamp, which must be affixed before execution. Any person who executes a bill of lading not duly stamped is liable to a fine of fifty pounds.

A DEBIT SLIP does not require stamping unless it is in such a form as to come within the definition of a bill of exchange, as where it contains the customer's signed order to pay money, in which case it needs a 2d. stamp. No stamp is needed on an internal form used for bookkeeping purposes.

A DEED of any kind not otherwise specifically charged with stamp duty requires a 10s. impressed stamp, which may be fixed at any time within 30 days of its first execution if made in the United Kingdom, or within 30 days of its first receipt in this country if executed abroad.

A DELIVERY ORDER does not require a stamp.

A DOCK WARRANT or other warrant for goods requires a 3d. adhesive stamp, which must be affixed by the person making or issuing the warrant, otherwise such person is liable to a fine of £20. A document given by an inland carrier acknowledging the receipt of goods, or a weight note issued in conjunction with a duly stamped warrant, does not require a stamp.

A GUARANTEE under hand requires a 6d. adhesive or impressed stamp. If adhesive, the stamp must be affixed and cancelled at the time of execution by the party signing the instrument. An impressed stamp may be affixed at any time within 14 days of the execution of the guarantee but not afterwards. A guarantee under seal requires a 2s. 6d. per cent. *ad valorem* impressed deed stamp, which may be affixed at any time within 30 days of its first execution



if made within the United Kingdom, or within 30 days of its receipt in this country if executed abroad.

A HOUSEHOLDER'S PROTEST requires stamping at the same rate as an ordinary protest (see below).

AN I.O.U. does not require a stamp.

LETTERS OF CREDIT that do not fall within the exact scope of Exemption 4 on page 274 must be stamped with an *ad valorem* bill stamp on the amount the grantee is authorized to draw. Thus an impressed *ad valorem* stamp must be borne by a letter of credit issued in the United Kingdom, authorizing drafts to be drawn *within* the United Kingdom, whether payable here or abroad.

THE MEMORANDUM OF ASSOCIATION of a joint-stock company requires a 10s. impressed deed stamp together with a fee stamp, the value of which varies according to the amount of the capital.

A NOTARIAL ACT of any kind, except a protest (see below), requires a 1s. adhesive stamp, which must be cancelled by the notary.

PROTEST OF A BILL OF EXCHANGE OR PROMISSORY NOTE. The stamp duty on a protest may be denoted by an adhesive or impressed stamp. An adhesive stamp, if used, must be properly cancelled by the notary issuing the protest. The stamp duty on a protest is the same as that on the bill or note if the duty on the latter does not exceed 1s. ; in any other case, the duty is 1s.

WAREHOUSE RECEIPTS are exempt from stamp duty.

WAREHOUSE WARRANTS. See Dock Warrant.

# APPENDIX A

## BILLS OF EXCHANGE ACT, 1882

[45 & 46 VICT. CH. 61.]

*[NOTE.—The page references in the margin are to the pages of the text wherein the relative Sections of the Act are discussed. The notes in italics in the text of the Act have been inserted by the author to guide the reader.]*

### Chapter 61.

A.D. 1882.

An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes. [18th August 1882.]

**B**E it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

### PART I.

#### PRELIMINARY.

Short title.

1. This Act may be cited as the Bills of Exchange Act, 1882.

2. In this Act, unless the context otherwise requires,—

"Acceptance" means an acceptance completed by delivery or notification. (*See section 17*)

"Action" includes counter-claim and set-off.

"Banker" includes a body of persons whether incorporated or not who carry on the business of banking.

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means promissory note

"Delivery" means transfer of possession, actual or constructive, from one person to another. (*See section 21.*)

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery. (*See section 32.*)

"Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

"Person" includes a body of persons whether incorporated or not.

"Value" means valuable consideration. (*See section 27.*)

"Written" includes printed, and "writing" includes print.

Interpreta-  
tion of terms.  
[70, 71, 76, 77,  
79, 80-90, 95,  
109, 122, 123,  
136, 248]

## PART II.

## BILLS OF EXCHANGE.

*Forms of Interpretation.*

3. (1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer. Bill of exchange defined [73, 76, 77, 83, 97, 109, 125]

(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

(4.) A bill is not invalid by reason—

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable

4. (1.) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. Inland and foreign bills. [81, 83, 240]

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2.) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

5. (1.) A bill may be drawn payable to, or to the order of, the drawer or it may be drawn payable to, or to the order of, the drawee. Effect where different parties to bill are the same person. [77, 81, 246, 248]

(2.) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6. (1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty. Address to drawee. [77, 89]

(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

7. (1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. Certainty required as to payee. [80, 81, 101, 102, 124, 155]

(2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

8. (1.) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable. What bills are negotiable. [79, 80, 129, 138, 190]

(2.) A negotiable bill may be payable either to order or to bearer.

(3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable

(5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Sum payable.

[78, 83, 124, 239]

9. (1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(a) With interest.

(b) By stated instalments.

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

*See section 57.*

Bill payable on demand.

[79, 123, 243]

10. (1.) A bill is payable on demand—

(a.) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b.) In which no time for payment is expressed.

(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

*Refer to sections 14, 36 (3), 45 (2), 60 and 73.*

Bill payable at a future time.

[79]

11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

(1.) At a fixed period after date or sight.

(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect

*Sections 14 (2) (3), 18 (3), and 65 (5) indicate how the due date is determined.*

Omission of date in bill payable after date.

[63, 112]

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

Ante-dating and post-dating.

[83, 104, 106]

13. (1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

(2.) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

Computation of time of due date.

[118, 207]

14. Where a bill is not payable on demand the day on which it falls due is determined as follows:

(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment

as fixed by the bill, and the bill is due and payable on the last day of grace : Provided that—

(a.) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case herein-after provided for, due and payable on the preceding business day :

(b.) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day.

34 & 35 Vict.  
c. 17.

(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

See sections 65 (5) and 18 (3).

(4.) The term " month " in a bill means calendar month.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

Case of need.  
[226, 228]

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1.) Negating or limiting his own liability to the holder :

(2.) Waiving as regards himself some or all of the holder's duties.

Optional stipulations by drawer or indorser.

[105, 141, 212]

See also section 31 (5) as to persons indorsing in a representative capacity.

17. (1.) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

See sections 2 and 21 as to the necessity for notification or delivery.

(2.) An acceptance is invalid unless it complies with the following conditions, namely :

Definition and requisites of acceptance.  
[200]

(a.) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(b.) It must not express that the drawee will perform his promise by any other means than the payment of money.

Time for acceptance.  
[77, 200, 201, 213]

18. A bill may be accepted—

(1.) before it has been signed by the drawer, or while otherwise incomplete : (See section 20.)

(2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment :

(3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

19. (1.) An acceptance is either (a) general or (b) qualified.

See section 44 as to the holder's right to refuse a qualified acceptance ; also section 52 (2).

General and qualified acceptances.  
[76, 201, 204, 213]

(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

- (a.) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated :
  - (b.) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn : (*See section 44 (2).*)
  - (c.) local, that is to say, an acceptance to pay only at a particular specified place :
- An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere :
- (d.) qualified as to time :
  - (e.) the acceptance of some one or more of the drawees, but not of all.

Inchoate instruments.

[111-115, 125, 131]

20. (1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser ; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

*Refer to section 12 as to the omission of the date.*

Delivery.

[88, 89, 110, 112, 113, 241]

21. (1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a.) in order to be effectual must be made either by or under the authority of the party, drawing, accepting, or indorsing, as the case may be :

(b.) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

#### *Capacity and Authority of Parties.*

22. (1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing

Capacity of parties.

[90]

or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that

Signature essential to liability.  
[88, 123]

(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Forged or unauthorised signature.  
[80, 93, 94]

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

See section 54 (2), 55, 60, 72 (2), 80 and 82 for the provision referred to.

25. A signature by procuration operates as notice that the agent has but a limited authority to sign; and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

Procuration signature.  
[91, 92]

*The provisions of this section do not, apparently, apply to signatures on behalf of companies.*

26. (1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

Person signing as agent or in representative capacity.  
[92]

(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

#### *The Consideration for a Bill.*

27. (1.) Valuable consideration for a bill may be constituted by,—

Value and holder for value.

(a.) Any consideration sufficient to support a simple contract;

(b.) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

[96, 99, 100]

(2.) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

28. (1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

Accommodation bill or party.  
[100]

(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

See section 59 (3).

29. (1.) A holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions; namely,

Holder in due course.  
[97-99, 103, 118]

(a.) That he became the holder of it before it was overdue, and

without notice that it had been previously dishonoured, if such was the fact ;

(b.) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3.) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

*Refer to section 27 (2).*

Presumption  
of value and  
good faith.

[97, 102, 152]

30. (1.) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2.) Every holder of a bill is *prima facie* deemed to be a holder in due course ; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

#### *Negotiation of Bills.*

Negotiation  
of bill.

[93, 98, 115, 116]

31. (1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2.) A bill payable to bearer is negotiated by delivery.

(3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

*See sections 16 and 26.*

Requisites  
of a valid  
indorsement.

[136, 137, 139,  
144]

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely :—

(1.) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

*See section 97 (d) as to dividend warrants.*

(4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described adding, if he think fit, his proper signature



(5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not. Conditional indorsement. [76, 139]

34. (1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. Indorsement in blank and special indorsement. [137, 138]

(2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3.) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

*See sections 7 and 8.*

(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person

35. (1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D only," or "Pay D for the account of X," or "Pay D or order for collection." Restrictive indorsement. [117, 139, 140]

(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

(3.) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

36. (1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise. Negotiation of overdue or dishonoured bill. [117-119, 125]

*Refer to sections 59-64 as to discharge and to section 35 (2) as to restrictive indorsements.*

(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

*Bill on demand is defined in section 10. By virtue of section 73, this sub-section applies to cheques, but not to promissory notes [section 86(3)].*

(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

(5.) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable. Negotiation of bill to party already liable thereon. [117-232]

Rights of the holder.

[96, 98, 119, 120, 232]

38. The rights and powers of the holder of a bill are as follows :

- (1.) He may sue on the bill in his own name :
- (2.) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill :
- (3.) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

#### *General duties of the Holder.*

When presentment for acceptance is necessary.

[202, 203, 214]

39. (1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment.

(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

Time for presenting bill payable after sight.

[203]

40. (1.) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

*See section 41 (2) for the provisions.*

(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

Rules as to presentment for acceptance, and excuse for non-presentment.

[203-3, 210, 213]

41. (1.) A bill is duly presented for acceptance which is presented in accordance with the following rules :

(a.) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue :

(b.) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only :

(c.) Where the drawee is dead presentment may be made to his personal representative :

(d.) Where the drawee is bankrupt, presentment may be made to him or to his trustee :

(e.) Where authorized by agreement or usage, a presentment through the post office is sufficient.

(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a.) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill :

(b.) Where, after the exercise of reasonable diligence, such presentment cannot be effected :

(c.) Where although the presentment has been irregular, acceptance has been refused on some other ground :

(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

42. (1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

Non-acceptance.  
[212, 213]

43. (1.) A bill is dishonoured by non-acceptance—

Dishonour by non-acceptance and its consequences.  
[213]

- (a.) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or  
(b.) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

44. (1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

Duties as to qualified acceptances.  
[104, 205, 213, 222]

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

See section 19 (2).

45. Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

Rules as to presentment for payment.  
[125, 127, 134, 165, 174, 205-10, 244]

*The provisions referred to are contained in section 46.*

A bill is duly presented for payment which is presented in accordance with the following rules:—

- (1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.

*The due date is calculated in accordance with section 14.*

- (2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

- (3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as herein-after defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

- (4.) A bill is presented at the proper place:—

- (a.) Where a place of payment is specified in the bill and the bill is there presented.  
(b.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.  
(c.) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.  
(d.) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

- (5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.
- (6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.
- (7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.
- (8.) Where authorized by agreement or usage a presentment through the post office is sufficient

Excuses for delay or non-presentment for payment.

[126, 206, 208, 210, 211, 214, 244]

46. (1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with—

(a.) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment

(b.) Where the drawee is a fictitious person.

(c.) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d.) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e.) By waiver of presentment, express or implied.

Dishonour by non-payment.

[213, 214]

47. (1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

*The provisions referred to are contained in sections 65-68.*

Notice of dishonour and effect of non-notice.

[215]

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

*See section 50 for the provisions referred to.*

Rules as to notice of dishonour.

[215-219]

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2.) Notice of dishonour may be given by an agent either in his own

name, or in the name of any party entitled to give notice whether that party be his principal or not.

- (3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given
  - (4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.
  - (5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.
  - (6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.
  - (7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.
  - (8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.
  - (9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.
  - (10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.
  - (11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.
  - (12.) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.
- In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—
- (a.) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.
  - (b.) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.
- (13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.
  - (14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.
  - (15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

50. (1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence. *See section 49 (15) as to delay in the post.*

Excuses for non-notice and delay. [218-220]

(2.) Notice of dishonour is dispensed with—

- (a.) When, after the exercise of reasonable diligence, notice as required

by this Act cannot be given to or does not reach the drawer or indorser sought to be charged :

- (b.) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :
- (c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment :
- (d.) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Noting or  
protest of  
bill.

[120, 221-5, 229]

51. (1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be, but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

*This section has been amended by the Bills of Exchange (Time of Noting) Act, 1917. See Appendix C.*

(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6.) A bill must be protested at the place where it is dishonoured : Provided that—

(a.) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day :

(b.) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(a) The person at whose request the bill is protested :

(b.) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

*See sections 69 and 70 as to lost bills.*

(9.) Protest is dispensed with by any circumstance which would

dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

52. (1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

*Qualified acceptances are dealt with in sections 19 and 44.*

(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Duties of holder as regards drawee or acceptor.

[169, 206-8, 214, 220, 223, 244]

#### *Liabilities of Parties.*

53. (1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

Funds in hands of drawee.

[105, 167]

(2.) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

54. The acceptor of a bill, by accepting it—

(1.) Engages that he will pay it according to the tenor of his acceptance:

Liability of acceptor.

[94, 95, 105, 10]

(2.) Is precluded from denying to a holder in due course:

(a.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(b.) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(c.) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55. (1.) The drawer of a bill by drawing it—

(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(b.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2.) The indorser of a bill by indorsing it—

(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(b.) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(c.) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

Liability of drawer or indorser.

[94, 95, 104-6, 108]

Stranger signing  
bill liable as  
indorser.

[90, 106, 242]

Measure of  
damages  
against  
parties to dis-  
honoured bill.  
[107, 222, 225,  
226, 245]

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows :

(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(a.) The amount of the bill :

(b.) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :

(c.) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

*Interest proper is defined in section 9 (3).*

Transferor  
by delivery  
and transferee.  
[95, 102, 132]

58. (1.) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a " transferor by delivery."

(2.) A transferor by delivery is not liable on the instrument.

(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

### *Discharge of Bill.*

Payment in  
due course.  
[100, 101, 117,  
171, 180, 181,  
231, 233]

59. (1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

" Payment in due course " means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2.) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged ; but

(a.) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b.) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.



61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

Acceptor the holder at maturity. [117, 233]

62. (1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

Express waiver. [117, 233]

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

63. (1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

Cancellation. [117, 133, 142, 234]

(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

64. (1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Alteration of bill. [114, 115, 117, 132, 133, 162, 235, 246]

Provided that—

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

#### *Acceptance and Payment for Honour.*

65. (1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *suprà* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

Acceptance for honour [protest. 86, 226, 227]

See section 93.

(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3.) An acceptance for honour *suprà* protest in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour:

(b) be signed by the acceptor for honour.

(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

66. (1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly

Liability of acceptor for honour. [228]

presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

Presentment  
to acceptor  
for honour.  
[228, 229]

67. (1.) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4.) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

Payment for  
honour *supra*  
protest.  
[117, 132, 214,  
229, 230]

68. (1.) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3.) Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

(7.) Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment.

#### *Lost Instruments.*

Holder's  
right to  
duplicate of  
lost bill.  
[120, 246, 247]

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

Action on  
lost bill.  
[220, 247]

70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

*Bill in a Set.*

71. (1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill. Rules as to sets.  
[87, 137]

(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4.) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment, or otherwise, the whole bill is discharged.

*Conflict of Laws.*

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows: Rules where laws conflict.  
[78, 86, 236-238]

(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b.) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

## PART III.

## CHEQUES ON A BANKER.

Cheque  
defined.

[121]

73. A cheque is a bill of exchange drawn on a banker payable on demand

Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

*For the provisions referred to see sections 10, 36 (3), 45 (2), and 60.*

Presentment  
of cheque for  
payment.

[125, 127, 134,  
207]

74. Subject to the provisions of this Act—

*(i.e., those of section 46, relating to excuses for non-presentment.)*

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him

Revocation  
of banker's  
authority.

[163]

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment :

(2) Notice of the customer's death

#### *Crossed Cheques.*

General and  
special cross-  
ings defined.

[127, 255]

76. (1.) Where a cheque bears across its face an addition of—

(a.) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or

(b.) Two parallel transverse lines simply, either with or without the words "not negotiable";

that addition constitutes a crossing, and the cheque is crossed generally.

(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

*Section 17 of the Revenue Act, 1883, extends the provisions of sections 76-82 of this Act to any document issued by a customer of a banker, and intended to enable any person to obtain payment from the banker of the sum indicated therein.*

Crossing by  
drawer or  
after issue.

[130, 132, 255]

77. (1.) A cheque may be crossed generally or specially by the drawer.

(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3.) Where a cheque is crossed generally the holder may cross it specially.

(4.) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Crossing a  
material part  
of cheque.

[130, 132, 133,  
255]

78. A crossing authorized by this Act is a material part of the cheque ; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

*Section 64 explains the effect of a material alteration.*

79. (1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

Duties of  
banker as to  
crossed cheques  
[171, 172, 174,  
255.]

(2.) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Protection to  
banker and  
drawer where  
cheque is  
crossed.  
[171, 172, 174-  
176, 248, 255]

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Effect of  
crossing on  
holder.  
[128, 255]

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

Protection to  
collecting  
banker.  
[176, 182-184,  
187-190, 192,  
248, 255]

See section 76 for definitions of general and special crossings. This section has been extended by the Bills of Exchange (Crossed Cheques) Act, 1906. See Appendix B.

## PART IV.

### PROMISSORY NOTES.

83. (1.) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

Promissory  
note defined.  
[238, 240]

(2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

Refer to section 4, and also to sub-section 89 (4).

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Delivery,  
necessary.  
[241]

See sections 2 and 21 for the meaning of delivery.

Joint and  
several notes.  
[241, 242]

85. (1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2.) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

Note payable  
on demand.  
[243]

86. (1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment  
of note for  
payment.  
[243, 244]

87. (1.) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

*Refer to section 52.*

(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

*Compare sections 45 and 46.*

(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

Liability of  
maker.  
[244]

88. The maker of a promissory note by making it—

(1.) Engages that he will pay it according to its tenor;

(2.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

*Compare sections 52 and 57.*

Application of  
Part II. to  
notes.  
[238, 241, 245]

89. (1.) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—

(a.) Presentment for acceptance;

(b.) Acceptance;

(c.) Acceptance *supra* protest;

(d.) Bills in a set.

(4.) Where a foreign note is dishonoured, protest thereof is unnecessary.

## PART V.

### SUPPLEMENTARY.

Good faith.  
[172, 183]

90. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

Signature.  
[88, 91, 143, 146]

91.—(1.) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2.) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

*Refer to sections 23 to 26.*

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded "Non-business days" for the purposes of this Act mean—

Computation of time.  
[204, 217]

(a.) Sunday, Good Friday, Christmas Day:

(b.) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it: 34 & 35 Vict. c. 17.

(c.) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceedings: and the formal protest may be extended at any time thereafter as of the date of the noting.

When noting equivalent to protest.  
[221, 223, 228]

*Refer to sections 65 to 68.*

94. Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

Protest when notary not accessible.  
[224]

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

*For Schedule 1 see next page.*

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

Dividend warrants may be crossed.—  
[255, 256]  
Repeal.

96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

97. (1.) The rules in bankruptcy relating to bills of exchange promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

Savings.  
[137, 254]

(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3.) Nothing in this Act or in any repeal effected thereby shall affect—  
(a.) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue:

33 & 34 Vict. c. 97.

(b.) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies:

25 & 26 Vict. c. 89.

(c.) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

(d.) The validity of any usage relating to dividend warrants, or the indorsements thereof.

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

Savings of summary diligence in Scotland.

Construction  
with other  
Acts, &c.

99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

Parole  
evidence  
allowed in  
certain  
judicial pro-  
ceedings in  
Scotland.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignment, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

### FIRST SCHEDULE.

Section 94.

Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, *A. B.* (householder), of \_\_\_\_\_ in the county of \_\_\_\_\_, in the United Kingdom, at the request of *C. D.*, there being no notary public available, did on the day of \_\_\_\_\_ 188 \_\_\_\_\_ at \_\_\_\_\_ demand payment (or acceptance) of the bill of exchange hereunder written, from *E. F.*, to which demand he made answer (state answer, if any) wherefore I now, in the presence of *G. H.* and *J. K.*, do protest the said bill of exchange.

(Signed) *A. B.*  
*G. H.* } Witnesses.  
*J. K.* }

*N.B.*—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

## APPENDIX B

### BILLS OF EXCHANGE (CROSSED CHEQUES) ACT, 1906

[6 EDW. 7. CH. 17.]

#### Chapter 17.

A.D. 1906.  
[183, 186, 232]

An Act to amend section eighty-two of the Bills of Exchange Act, 1882. [4th August 1906.]

**B**E it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendment of  
45 & 48 Vict.  
c. 61. s. 82.

1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

Short title.

2. This Act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this Act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906.



## APPENDIX C

### BILLS OF EXCHANGE (TIME OF NOTING) ACT, 1917

[7 & 8 GEO. 5. CH. 48.]

#### Chapter 48.

An Act to amend the Bills of Exchange Act, 1882, with respect to the time for noting Bills. A.D. 1917.  
[223]

**B**E it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. In subsection (4) of section fifty-one of the Bills of Exchange Act, 1882 (which relates to the time of noting a dishonoured bill), the words " it must be noted on the day of its dishonour " shall be repealed, and the following words shall be substituted therefor, namely, " it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day." Time of noting  
45 & 46 Vict.  
c. 61. [225.]

2. This Act may be cited as the Bills of Exchange (Time of Noting) Act, 1917, and shall be construed as one with the Bills of Exchange Act, 1882, and the Bills of Exchange Acts, 1882 and 1906, and this Act may be cited together as the Bills of Exchange Acts, 1882 to 1917. Short title and  
construction.  
6 Edw. 7.  
c. 17.

## APPENDIX D

### BILLS OF EXCHANGE ACT (1882) AMENDMENT ACT, 1932

[22 & 23 GEO. 5. CH. 44.]

#### Chapter 44.

An Act to amend the Bills of Exchange Act, 1882. A.D. 1932.  
[248]

**B**E it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. Sections seventy-six to eighty-two of the Bills of Exchange Act, 1882 (which relate to crossed cheques), as amended by the Bills of Exchange (Crossed Cheques) Act, 1906, shall apply to a banker's draft as if the draft were a cheque. Amendment as  
to cheques  
drawn by a  
bank on itself.  
45 & 46 Vict.  
c. 61—  
6 Edw. 7.  
c. 17.

For the purposes of this section, the expression " banker's draft " means a draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank.

2. This Act may be cited as the Bills of Exchange Act (1882) Amendment Act, 1932. Short title.

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